80-6675

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

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VERNON EUGENE MCMANUS,

Petitioner,

VS.

STATE OF TEXAS,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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INDEX


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | 1 |
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 4 |
| HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW | 10 |
| REASONS FOR GRANTING THE WRIT | |

I. WHETHER THE RULE OF WITHERSPOON VS. ILLINOIS, 391, U.S. 510 (1968) AND ADAMS VS. TEXAS, U.S. No. 79-5175, (June 25, 1980), WAS VIOLATED BY THE EXCLUSION FOR CAUSE OF PROSPECTIVE JURORS, RICHARD REED BLANCHARD, WHO ALTHOUGH WHO OPPOSED TO CAPITAL PUNISHMENT TO THE EXTENT REQUIRED FOR EXCLUSION UNDER WITHERSPOON, COULD NOT SWEAR THAT THE POSSIBLE IMPOSITION OF THE DEATH PENALTY WOULD NOT AFFECT HIS DELIBERATION.

II. WHETHER V.A.C.C.P., ARTICLE 37.071 IS UNCONSTITUTIONAL IN ITS APPLICATION IN THAT IT ALLOWS THE INTRODUCTION INTO EVIDENCE FOR THE JURYS CONSIDERATION UNADJUDICATED CRIMINAL CONDUCT AND HERESAY EVIDENCE AND ALLOWS THE JURY TO USE SUCH EVIDENCE TO SUPPORTS ITS ANSWERS TO THE TEXAS SPECIAL ISSUES AND THEREBY VIOLATES THE PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

III. PETITIONER WAS DENIED DUE PROCESS IN HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN THAT HIS RETAINED ATTORNEY DON SMITH BREACHED HIS FIDUCIARY DUTY TO PETITIONER IN HIS OBLIGATIONS PURSUANT TO THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO PROVIDE PETITIONER WITH EFFECTIVE ASSITANCE OF COUNSEL BY ENGAGING IN SEXUAL RELATIONS WITH PETITIONER'S TRIAL AND THROUGH THE PENDENCY OF PETITIONER'S APPEAL AND FILING A DIVORCE ACTION AGAINST PETITIONER AND THEREBY ACTED TO DEPRIVE PETITIONER OF A FAIR AND IMPARTIAL TRIAL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

| | |
|---|---|
| CONCLUSION | 18 |

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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Petitioner prays that a Writ of Certiorari issue to review the decision of the Court of Criminal Appeals of the State of Texas, entered on February 25, 1981, denying Petitioner's Application for Writ of Habeas Corpus.

## QUESTIONS PRESENTED

1. Whether Petitioner was denied due process in his right to effective assistance of counsel in that his retained attorney Don Smith breached his fuduciary duty to Petitioner and his obligations pursuant to the sixth amendment of the United States Constitution by engaging in sexual relations with Petitioner's wife prior to the completion of Petitioner's trial and through the pendency of Petitioner's appeal. Whether the relationship between Petitioner's attorney Don Smith and Petitioner's wife effected said attorneys advise to Petitioner and acted to deprive Petitioner of fair and impartial as guaranteed by the fifth, sixth and fourteenth amendments of the United States Constitution.

2. Whether V.A.C.C.P., Article 37.07 (1) is unconstitutional in his application that allows for the introduction of unadjudicated criminal allegations at the punishment phase of the trial and other evidence which would be inadmissible in all criminal prosecutions in the State of Texas.

3. Whether the rule of Witherspoon vs. Illinois, 391 U.S. 510 (1968) and Adams vs. Texas, U.S. , #79-5175, June 25, 1980, was violated by the exclusions for cause juror, Richard Reed Blanchard, who was excused for cause after stating that the death penalty would effect his deliberation on both the guilty question and the punishment phase of the proceedings notwithstanding the fact that two days prior to his exclusion he was accepted as a juror by the state and the defense and was administered the oath as a juror according to the Texas law.

## OPINIONS BELOW

The Court of Criminal Appeals denied Petitioner's Application for Writ of Habeas Corpus without issuing a written order. A copy of the denial is attached hereto as Appendix "A". The majority and decending opinions of the Texas Court of Criminal Appeals on direct appeal are reported at 592 S.W. 2d 933 (1980).

## JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3), Petitioner having asserted below and asserting he had deprivation of rights secured by the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the fifth, sixth and fourteenth amendments to the United States Constitution.

2. This case also involves the following provisions of Texas laws:

Texas Code of Criminal Procedure Article 37.07 (1). Procedure in Capital Case.

(a) Upon a finding that the defendant is guilty of a capital offense the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the Court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The Court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unamiously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the Court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the Court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within sixty (60) days after certification by the sentencing Court of the entire record unless time is extended an additional period not exceed thirty (30) days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Texas Code of Criminal Procedure Article 37.07 (3). Evidence of Prior Criminal Record in all Criminal Record after a finding of guilty.

(a) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to the prior criminal record of the defendant, his general reputation and his character. The term prior criminal record means a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged.

Texas Penal Code. 12.31 (b) Capital Felony.

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is manditory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the manditory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Texas Penal Code. 19.03 (a) (3 Capital Murder.

(a) A person commits an offense if he commits murder as defined under Section 19.02 (a) (1) of this code and:

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration.

## STATEMENT OF THE CASE

On July 29, 1976, Petitioner was indicted in Cause No. 249,771, for the offense of capital murder alleging that he "on or about July 24, 1976, did then and there unlawfully, intentionally and knowingly, acting as a party with Paula Cantrell Derese and other persons to the grand jury unknown, cause the death of Paul Harvey Cantrell by choking and strangling him with a cord and cutting him with a knife and said murder was committed for remuneration namely the proceeds of life insurance in the Estate of Paul Harvey Cantrell and Mary Bright Cantrell." On May 19, 1977, a jury found appellant guilty of capital murder and on May 20, 1977, answered each of the special issues in the affirmative. The Court of Criminal Appeals affirmed Petitioner's conviction in a 6-3 decision on December 5, 1979, re-hearing denied January 16, 1980.

On June 23, 1980, a hearing was held pursuant to Petitioner's Application for Writ of Habeas Corpus filed pursuant to V.A.C.C.P. Article 11.07. (Appendix "B") The Trial Court made findings of fact and conclusions of law and submitted the same to the Texas Court of Criminal Appeals which denied Petitioner's Application for Writ of Habeas Corpus without issuing a written order on February 25, 1981. (Appendix "C")

This Application for Writ of Certiorari results therefrom.

I. The Guilt Trial

The Texas Court of Criminal Appeals summarized the facts of the crime as follows:

> In the early morning hours of July 25, 1976, the bodies of the deceased, Paul and Mary Cantrell, were discovered in their home by their daughter, Paula Cantrell Derese. They were found lying on the floor of their den, and both had been strangled and had had their throats cut. Four days later, Paula, the only child of Paul and Mary, gave a statement in which she implicated herself and appellant in the murders. Paula, in testifying against appellant, stated that she had pled guilty to the murders of her parents, and that by her conduct, she had encouraged the commission of the crime. She stated that she admitted her part in the crime because she could not have taken her parents' money and lived like she wanted to.
>
> Paula first met appellant in 1970, when she lived in Beaumont and worked for Lamar University, where appellant was an assistant football coach. She later married Herbie Derese and had a son, Chad, in December of 1973. Her parents did not approve of Paula's marriage to Herbie. In 1975, Paula and Herbie separated and Paula with her son, moved into her parents' home in Baytown. She lived there with her parents until their deaths in Jyly, 1976. During this period of time, there was conflict between Paula and her parents, over Paula's desire to reconcile with her husband. There was testimony that Paula's father had threatened to wage a court battle for the legal custody of Chad if Paula reconciled with Herbie.
>
> In January or February of 1976, appellant restablished with Paula. Paula testified that at this time, she refused to go out with him. However, she talked to him several times on the telephone. A few weeks later, she had a serious argument with her parents about Herbie and was upset. She agreed to have lunch with appellant, and at this time discussed her problems with her parents with him. She testified that she told appellant that she would do anything to be free of her parents. Appellant responded that he knew of a way that that could be taken care of so that she would not have to worry

about that again. Appellant also asked her about how much insurance Herbie had, and whether she wanted him killed. Paula responded that she did not want Herbie killed.

Sometime during February, appellant cosigned a $1,5000 loan which Paula took out.

About two weeks after their first meeting, during which time Paula and appellant talked about on the telephone several times, they met again for lunch. At this meeting, appellant told Paula that things had been taken care of so that she would not have to worry about it again. He told her that he knew some people who killed people for money, and that there had already been a payment made to have her parents killed. Paula testified that she was supposed to pay appellant out of the proceeds of her parents' estate and life insurance; appellant told her that he wanted one third. She testified that although she never expressly told him that she would pay him "she let it slide." She stated that at this time, she did not believe that he was serious.

In March, 1976, appellant and his business partner, Vernon Olney, came to Paula's house to discuss a business matter, and Paula, with her mother, showed appellant through the house.

Paula and appellant maintained communication, and in April, Paula went to work for appellant as his secretary in his plywood brokerage business. She testified that at this time, she thought appellant was serious about having her parents murdered.

On Easter weekend, Paul and Mary Cantrell had made plans to meet some friends in Austin to play golf. Prior to this weekend, appellant had a discussion with Paula about insurance double indemnity and "making something look like an accident." Paula stated that she did not know what this meant. Appellant knew of the deceased's plans Easter weekend, and Paula told him the motel in which they would be staying. Paula testified that when her parents left for their trip, she thought that something was going to happen to them that weekend. She thought that appellant was serious about murdering them. When questioned about whether she tried to warn them, she stated that she just could not tell them about the situation. She admitted that this was when she started encouraging the murders of her parents. She testified that she turned her back on the situation. Still, she called her parents several times that weekend, and they returned home safely.

In May, appellant discussed with Paula borrowing money from a credit union; this money was to be used to pay the person who was supposed to do the killings. He also told her that the "contact person" or "hit man" was sick in Ohio at that time.

During this time, Paula also became familiar with the name "Ben T." and knew that he was somehow involved in the scheme to have her parents murdered.

During June, appellant was drinking heavily and was gone frequently from his business. Testimony showed that appellant was trying, but not not able to have the murders done soon. He told Paula that he should not have counted upon anyone else to do the killings, that he should have done them himself. He said that he would walk up to the deceased's house and act like he was going to talk about business and kill them himself.

On Friday, July 23, Paula talked to appellant on the telephone from her house. She had observed him drive by her house that day. Appellant told her that the "man is in the area" and told her to leave the house. He had previously warned her not to be in the house when "the man is in the area" and told her to leave the house. He had previously warned her not to be in the house when "the man" came. That evening, Paula went over to a friend's house. She had observed him drive by her house that day. Appellant told her that "the man is in the area" and told her to leave the house. He had previously warned her not to be in the house when "the man" came. That evening, Paula went over to a friends house and returned home shortly before midnight.

Paula again talked to appellant on Saturday, July 24, and told him that she had a date that evening; she further told him that her parents would be home that night. That night, she returned home from her date, she discovered the bodies of her parents in their den. Over the next few days, appellant visited Paula several times, and repeatedly told her to "keep her mouth shut and not to crack." He then told her how the murders had occurred and that he had been present during them. According to his statements to Paula, appellant had rented a car from the Houston Airport and had picked up two men. They then proceeded to the Cantrell house. All of them wore gloves. They had used a pipe to hit the victims in the head, and then had cut their throats. The three had started to ransack the house, but a car pulled up across the street, so they left. Appellant had also made a comment that if one hair was found on the bodies of the deceased, "he (appellant) was dead."

II. Punishment Phase of the Trial

Immediately following Petitioner's conviction, a penalty trial was conducted before the same jury pursuant to Texas Code of Criminal Procedure, Article 37.07 (1). At the outset, the stated introduced the testimony of Joyce Sinclaire and her husband Don Sinclaire whereby evidence of an extraneous, unadjudicated criminal allegations against Petitioner were presented. In the testimony presented, a telephone conversation Joyce Sinclaire had with an unidentified third party were related. (Vol. 18, pg. 158)

## STATE HABEAS CORPUS PROCEEDINGS

The record of the State Habeas Corpus hearing reflects that Petitioner retained Don Smith to represent him in charges in Cause No. 249,771, for the felony offense of capital murder. Don Smith in turn retained Mark Vela and Larry Doherty to assist him in representing Petitioner. (R.p. 12-13) However, Don Smith told Mark Vela and Larry Doherty not to discuss the facts of the case with Vernon McManus. (R.p. 12, 13, 14, 56, 57) Don Smith received all the reports from the investigator. (R.p. 16, 110, 112) Mark Vela did not review the contents of these reports. The reports were seen by Mark Vela for the first time during the Writ hearing in June, 1980. During the Voir Dire of Petitioner's trial, Don Smith and Vernon McManus spent every evening together in various bars in Houston and Baytown, Texas. Mr. McManus testified that his attorney, Don Smith advised him to flee and assisted him by providing him with approximately $600 - $700, which Mr. Smith received from three clients on the morning of April 20, 1977. Mr. Smith denied the allegation; however, his records show that on April 23, 1977, he received $600.00 from three clients. Mr. Smith denied ever having any meetings with Regina McManus Smith during the trial. However, on cross-examination, he stated that he did meet with her on April 24, 1977, the day after Petitioner fled. He also met with her on May 18, 1977, after the jury found Petitioner guilty of capital murder. He again met with her on or about May 25, 1977, to discuss the divorce. Both Mr. McManus and Mr. Smith testified that they talked on May 26, 1977, regarding the divorce. Mr. Smith filed the divorce petition representing Regina McManus Smith on May 27, 1977. (R.p. 269) In November, 1977, Don Smith engaged Robert Montgomery, an attorney in Pasadena, Harris County, Texas, to represent Regina McManus against her husband, Vernon McManus. (R.p. 262)

Mr. Smith never discussed the filing of a Motion for New Trial with Vernon McManus. Don Smith never discussed filing a Motion for New Trial with Mark Vela and Larry Doherty. (R.p. 56,57) On May 31, 1977, Don Smith filed a form Motion for New Trial. (Record on appeal, Vol. 1, pg. 114)

No other Motion for New Trial was ever filed or prepared by any attorney representing Vernon McManus. No juror misconduct was ever investigated. No witnesses were ever talked to concerning newly discovered evidence. No research was done concerning the law to support Petitioner's Motion for New Trial. Don Smith engaged in sexual relations with Regina McManus Smith on or about June 16, 1977, in a motel room in Beaumont, Texas. Neither Don Smith nor Regina McManus Smith ever disclosed to Vernon McManus their relationship. They admitted their relationship to Vernon McManus after he found out that the relationship existed. Don Smith was appointed on June 20, 1977, as the sole attorney for Vernon McManus. (Record on appeal, p. 147) Mark Vela was appointed to represent Petitioner in March, 1978. Don Smith did not assist in representing Vernon McManus in the appeal of his conviction in Cause No. 249,711.

## HOW FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. On direct appeal, Petitioner challenged the sufficiency of evidence to support his conviction. The Court of Criminal Appeals upheld his conviction by finding that "the record clearly reflects that Appellant expected to share in the proceeds from the estates of the victims and that he acted out of an expectation that he would receive such remuneration." Petitioner maintained that on re-hearing that by sustaining his conviction based upon an expectation of remuneration, the Court of Criminal Appeals amended V.T.C.A.P.C., 19.03 (a)(3) in that the legislature of the State of Texas authorized a conviction based solely on the premise that Petitioner was promised remuneration or committed capital murder for remuneration or the promise of remuneration. The sufficiency of evidence to convict Petitioner was raised in State Habeas Corpus proceedings. Again, the Court of Criminal Appeals denied Petitioner's requested relief without issuance of a written order.

2. In his application for Writ of Habeas Corpus, Petitioner alleged that his fifth, sixth and fourteenth amendment rights to the effective assistance of counsel and counsel free of a conflict of interest was abbragated by his retained attorney of choice Don Smith's sexual involvement with Petitioner's wife Regina McManus Smith. A hearing was held

incident to Petitioner's allegations and the Court of Criminal Appeals denied relief without issuance of a written order.

3. On direct appeal, Petitioner challenged the use of several unadjudicated criminal allegations at the punishment phase of his trial. Petitioner maintained that the introduction of the unadjudicated offenses denied due process and in turn that Article 37.07(1) is unconstitutional in itsapplication. Unconstitutional in its application because of the use of totally unrealiable evidence which would be admissible in any other criminal proceedings in the State of Texas. Petitioner's allegation was denied on direct appeal, re-hearing and via State Habeas Corpus proceedings.

4. At trial, Petitioner object to summary exclusion of juror Blanchard for cause after he was sworn as a member of the jury without affording Petitioner an opportunity to question juror Blanchard concerning his "change of heart", about the death penalty. On direct appeal, Petitioner attached the exclusion of juror Blanchard based on the fact that he was a sworn member of the jury to hear the case. The Court ruled against Petitioner on direct appeal recognizing however, that juror Blanchard was excused based on 12.31 (b). On re-hearing, Petitioner asserted that the rule of Witherspoon vs. Illinois, was violated by the exclusion of juror Blanchard. Re-hearing was denied without issuance of a written order. In State Habeas proceedings, Petitioner challenged the validity of his capital murder conviction based upon this Court's decision in Adams vs. Texas, U.S. 65, LED, 2d 581 (1980). The Texas Court of Criminal Appeals denied Petitioner's Application for Writ of Habeas Corpus without issuance of a written order despite its prior finding that juror Blanchard had been excused pursuant to V.T.C.A.P.C., 12.31 (b) McManus vs. State, 591 S.W. 2d 505 (Tex.Crim.App. 1979)

## REASONS FOR GRANTING THE WRIT

### I.

Whether the Rule of Witherspoon vs. Illinois, 391 U.S. 510 (1968) and Adams vs. Texas, U.S. No. 79-5175, (June 25, 1980), was violated by the exclusion for cause of prospective jurors,

> Richard Reed Blanchard, who, although who opposed to capital punishment to the extent required for exclusion under Witherspoon, could not swear that the possbile imposition of the death penalty would not affect his deliberation.

The facts presented clearly crystalize the use in Texas of Vernon's Ann. Penal Code, 12.31 (b) as a means to exclude otherwise qualified jurors in capital murder trials from serving on a jury based solely on a statement that the death sentence would effect their deliberation on the issues of fact. The record clearly reflects that three days piror to his exclusion, Richard Reed Blanchard was an acceptable juror to both the state and the defense and was administered the oath of a juror. Only after substantial thought on his part, that the manditory life or death penalty would effect his deliberation on the fact issues, did juror Blanchard approach the trial court.(Vol. IV., pg. 909, 934) Petitioner asserts that the very essence of Adams rests on the ability of Texas State Prosecutors to exclude jurors simply because they attempt to honestly follow their oath as jurors and consider the seriousness of the ultimate penalty - death.

> As noted by Justice White in Adams "the touchstone of inquiring into 12.31 (b) was not whether putative jurors could and would follow their instructions and answer the posted questions in the affirmative if they honestly believe the evidence warned it beyond reasonable doubt." "Rather, the touchstone was whether the fact that the imposition of the death penalty would follow automatically from affirmative answers to the questions would have any effect at all on the jurors who stated they would be effected by the possibility of the death penalty, but who apparently meant only the potential lethal consequences of their decisions would invest their deliberation with greater seriousness and gravity or would involve in it emotionally."

The fear expressed by Justice White is evident here as a juror sworn was excluded because he expressed a belief that the ultimate punishment would effect his deliberation.

Texas has applied 12.31 (b) to exclude jurors whose only fault was to take the responsibilities with special seriousness or to acknowledge

honesty that they might or might not be effected. Consequently, Petitioner's conviction cannot stand. It further should be noted that the seriousness of the problems in this particular case cannot be considered to be a procedural default on behalf of Petitioner by any application of any contemporanous objection rule under Waynewright vs. Sikes, 433 U.S. 72 (1977) or because of the action was not raised on direct appeal concerning the constitutionality of 12.31 (b) in its application and violation of Witherspoon doctrine. Rather, as noted in the Adams decision, the Court of Criminal Appeals continously rejected any challenge to the unconstitutionality of 12.31 (b). Thereby, the exclusion of a juror obviously qualified under Witherspoon solely based on 12.31 (b) and the accompanying objection of this particular case should cause reversal of appellant's conviction. For these reasons the Writ of Certiorari should be granted.

II.

Whether V.A.C.C.P., Article 37.071 is unstitutional in its application in that it allows the introduction into evidence for the jurys consideration unadjudicated criminal conduct and heresay evidence and allows the jury to use such evidence to support its answers to the Texas special issues and thereby violates the Petitioner's rights under the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

During the punishment phase of Petitioner's trial, the State introduced testimony of Joyce Sinclaire and her husband Don Sinclaire. The record indicates that Joyce Sinclaire accused Petitioner of attempting to extort money from her in February, 1976. Mrs. Sinclaire also alleged that Petitioner planned to kill her husband. Mrs. Sinclaire also testified that he had hired a "hit man" to kill her and her family if any harm came to him. She then recounted a telephone conversation with an unrecognized person who did not identify himself and allegedly told her that if anything happened to Petitioner he would kill her and her family. The Texas Court of Criminal Appeals concluded after reviewing such testimony that "error, if there was any, in the admission of this testimony was clearly harmless in light of the substantial testimony

concerning appellant's repeated threats, expressed intent to do harm to, and criminal acts towards Joyce and Don Sinclaire."

In Jurek vs. Texas, 428 U.S. 262,276 (1976) this court held that the constitutionality of the Texas Death Penalty Procedure partially based upon the prompt judicial review of the jury's decision in a Court with State wide jurisdiction. This Court held that Texas provides a means for both the even handed, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be "wantingly" or "frequently" imposed, it does not violate the constitution. With this statement in mind, the Texas Court of Criminal Appeals has interpreted V.A.C.C.P., Article 37.071, to mean that evidence of unadjudicated criminal offenses may be introduced into evidence at the punishmentment phase of a capital murder trial. See Garcia vs. State, 581 S.W. 2d 168 (Tex. Crim. App. 1979) However, the Texas Court of Criminal Appeals has failed to reconcile long standing principals in Texas jurisprudence whereby unadjudicated extraneous criminal allegations may not be considered at the punishment phase of criminal trials pursuant to requirements of V.A.C.C.P., Article 37.07 (3). However, the Texas Court of Criminal Appeals has interpreted such adjudicated criminal allegations as being relevant for the jurys deliberation on special issue number two.

In upholding the admission of extraneous unadjudicated offenses, the Texas Court of Criminal Appeals has maintained that such evidence is admissible for the jury's consideration as being relevant to the special issues which are required by statute. Texas ignores the fact that unadjudicated criminal offenses are by their very nature inherantly unreliable and prejudicial. Petitioner consistently has maintained that the use of such unreliable evidence in support of his death sentence violates the eighth amendment prohibition against the imposition of cruel and unusual punishment.

Further, in all criminal proceedings in Texas, a Defendant can expect certain evidence to be introduced at the punishment phase of the trial. V.A.C.C.P., Article 37.07 is specific that unadjudicated criminal allegations may not be considered by the Court or jury in assessing punishment.

Additionally, an accused is entitled to certain notice and proof prior to the imposition of a manditory life sentence pursuant to Texas Penal Code, Section 12.42 (d). For example, in Parasco v. State, 309 S.W. 2d 405, (Tex. Crim. App. 1958), the Texas Court of Criminal Appeals specifically stated "an accused is entitled to proper notice of the indictment of any prior conviction which the State seeks to use in connection with a primary offense whether it be an element of the offense or for enhancement purposes." No such notice guidelines are required in a capital murder proceeding.

In capital murder trials, no specific notice is required by V.A.C.C.P., Article 37.071, before an unadjudicated offense may be introduced into evidence. The lack f notice before introducing the controversal evidence deprives the Defendant of an opportunity to prepare cross-examination and investigate such allegations. In the case at bar, Don Sinclaire was allowed to testify that he encountered the appellant while the Petitioner was disguised. Joyce Sinclaire then testified that he intended to kill her husband during that meeting. She also testified of several extortion attempts by Petitioner and recounted a telephone conversation with some unknown person. All of the unadjudicated murder plans, extortion plans and threats were unsubstantiated by any contact with the police prior to Petitioner's arrest for the case at bar. Petitioner was never indicted or charged for the allegations made by Joyce and Don Sinclaire.

In Presnell vs. Georgia, 439 U.S. 14 (1979) this Court clearly held that a conviction for capital murder must be based upon the specific offense charged and not for any additional offenses. In reversing the Georgia Supreme Court's decision, this Court noted that in Cole vs. Arkansas, 333 U.S. (1948) Justice Black stated that:

> "it is as much a violation of due process to send the accused to prison following conviction of a charge in which he was was never tried as it would be to convict him on a charge that was never made."

In Presnell, this Court noted that "these fundamental principals of procedural fairness apply with no less force as to the penalty phase of a trial in a capital phase then they do in a guilty determination of any criminal trial." See C.F. Gardner vs. Florida, 430 U.S. 349 (1977). In Texas, the State is not required to notify that Defendant of its intent to use unadjudicated criminal allegations at the punishment phase of a capital murder trial. Normally, a capital murder jury is allowed to hear the state's allegations of other misconduct by the accused without presentation of evidence contradicting the same. Fundamental fairness requires an accused be given notice of the charges against him for which he will be tried. To deny the same acts to deny an accused due process.

(It should be noted at several other jurisdictions do not permit extraneous offenses.) Thereby, Petitioner maintains that the Texas Death Penalty Procedure in V.A.C.C.P., Article 37.071 and as upheld by the Texas Court of Criminal Appeals allows for a death sentence based on unadjudicated unreliable and inherantly prejudicial evidence and acts to deny an accused charged with capital murder due process and his rights guaranteed by the fifth, sixth, eighth and fourteenth amendments to the United States Constitution and violates the clear intent of this Court's decision. For these reasons the Writ of Certiorari should be granted.

III.

Petitioner was denied due process in his right to effective assistance of counsel in that his retained attorney Don Smith breached his fiduciary duty to Petitioner in his obligations pursuant to the sixth amendment of the United States Constitution to provide Petitioner with effective assistance of counsel by engaging in sexual relations with Petitioner's trial and through the pendency of Petitioner's appeal and filing a divorce action against Petitioner and thereby acted to deprive Petitioner of a fair and impartial trial as guaranteed by the fifth, sixth and fourteenth amendments of the United States Constitution.

In Cuyler vs. Sullivan, 100 Supreme Court 1708 (1980), this Court stated that in order to establish a violation of the sixth amendment a defendant must demonstrate that an actual conflict of interest adversely

affected his lawyers performance. The record before this Court reflects that Petitioner retained Don Smith to represent him in Cause No. 249,771, wherein Petitioner was charged with capital murder. Don Smith in turn retained Mark Vela and Larry Doherty to assist him in representing Petitioner.

By definition, a conflict of interest exists when an attorney's loyalty to his client is placed in jeopardy by his relationship to another party or interest. The record clearly reflects that Don Smith was establishing a relationship with Regina McManus Smith at a critical state in the criminal process and Smith's total abandonment of Petitioner. The significance of the relationship is clearly established by Smith's failure to disclose his relationship with Petitioner's wife for nearly a year after its inception. For these reasons a Writ of Certiorari should be granted.

In Zuck v. Alabama, 588 F. 2d, 436 (5th circuit 1979), the law firm which served as counsel to Zuck also represented, in an unrelated civil matter, the state's prosecutor who tried Zuck. No one disclosed to the Defendant the relationship between his attorney and the prosecuting attorney. In Zuck, supra, the Fifth Circuit defined an actual conflict of interest as occurring "when a defense attorney places himself in a situation inherently conducive to divided loyalties. The nondisclosure of the party's relationship is further evidence of the possible detrimental effect the relationship might have on the attorney's representation." This concept is the cornerstone of the ABA Disciplinary Rule 5-101 which states that:

> Except with the concept of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment may be affected by his own financial, business, property, or personal interest. (Emphasis added)

Thereby, Petitioner maintains that the habeas record demonstrates that an actual conflict of interest existed which detrimentally affected his attorney's conduct. No justification by Don Smith can be made for his failure to investigate or prepare a Motion for New Trial and must constitute a dereliction of his duty to his client.

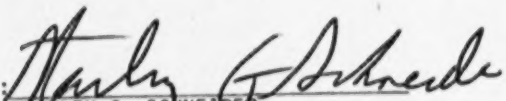
> It is not enough to assume the defense counsel thus participated into the case thought that there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the Court could say what a prompt a thorough going investigation might disclose as to the facts. No attempt was made to investigate.

There exists a clear necessity to prepare and argue a thorough Motion for New Trial. As noted by defense witnesses, Robert Scott, and Carolyn Garcia. (R.p. 450 and 454), numerous convictions are over turned during the pendency of a Motion for New Trial.

## CONCLUSION

Petitioner prays that the Petition for Writ of Certiorari be granted.

Respectfully submitted,
SCHNEIDER, GARCIA & POLLAND

BY: 

STANLEY G. SCHNEIDER
T.B.A.# 17790500

3000 Richmond, Suite 530
Houston, Texas 77098
(713) 524-7881

Cause No. 249,771

| | | |
|---|---|---|
| EX PARTE, | I | IN THE DISTRICT COURT OF |
| | I | HARRIS COUNTY, T E X A S |
| VERNON EUGENE McMANUS | I | 179TH JUDICIAL DISTRICT |

APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES VERNON EUGENE McMANUS, Petitioner in the above styled and numbered cause and presents this, his Application for Writ of Habeas Corpus, and for cause would show the Court the following:

I.

Petitioner is illegally confined at the Ellis Unit, Texas Department of Corrections, Huntsville, Texas, by W.J. Estelle, Jr., Director of the Texas Department of Corrections, under an illegal and unconstitutional conviction of death. A copy of the judgment and sentence of the Trial Court is attached hereto as Exhibit "A".

II.

On July 29, 1976, Petitioner was indicted in Cause Number 249,771, for the offense of capital murder, alleging that he on or about July 24, 1976, did then and there unlawfully, intentionally and knowingly, acting as a party with Paula Cantrell Derese and other persons to the Grand Jury unknown, cause the death of Paul Harvey Cantrell by choking and strangling him with a cord and cutting him with a knife; and said murder was committed for remuneration and the promise of remuneration, namely money from the proceeds of life insurance in the estate of Paul Harvey Cantrell and Mary Bright Cantrell. On May 19, 1977, the jury found Petitioner guilty of the offense of capital murder, and on May 20, 1977, the jury answered each of the special issues in the affirmative. The Court pronounced the sentence on June 20, 1977. Petitioner gave timely notice of appeal

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to the Texas Court of Criminal Apeals in Austin, Texas. Petitioner's conviction was affirmed by written decision dated December 5, 1979. Three Judges dissented from that opinion. Petitioner's Motion for Leave to File Motion for Rehearing was denied on January 16, 1980.

III.

GROUNDS OF RELIEF

A.

Petitioner was denied due process and his right to effective assistance of counsel in that his retained attorney, Don Smith, breached his fiduciary duty to Petitioner and his obligations pursuant to the Sixth Amendment of the United States Constitution to provide Petitioner with effective assistance of counsel, by engaging in sexual relations with Petitioner's wife prior to the completion of Petitioner's trial and through the pendency of Petitioner's appeal. The relationship between Petitioner's attorney, Don Smith, and Petitioner's wife, affected said attorney's advice to Petitioner and acted to deprive Petitioner of a fair and impartial trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and Article 1, Sections 10 and 19 of the Texas Constitution.

Petitioner alleges that Don Smith was initially retained as his retained attorney in July, 1976, after his arrest and indictment for the offense of capital murder. During the pendency of the criminal proceedings resulting from his conviction, Petitioner confided only in Don Smith. Don Smith retained other attorneys to assist in his representation. However, Petitioner never discussed tactics nor the facts of the case with anyone but Don Smith.

After Petitioner's escape, arrest, and confinement in April, 1977, Petitioner alleges that Don Smith engaged in sexual relations with his wife, Regina McManus, during the pendency of Petitioner's trial and prior to his sentencing. Prior to the time that Petitioner's Motion for New Trial was overruled, Don Smith his retained attorney, made various promises and representations to Petitioner concerning his appeal. Attorney Don Smith did nothing to aid or assist in representing Petitioner and, in fact, cohabitated with Petitioner's wife. The culmination of Don

Smith's breach of his relationship with Petitioner was that Petitioner's wife, Regina McManus, obtained a divorce from Petitioner, and is currently married to Don Smith.

Petitioner alleges that because of Don Smith's desires to engage in sexual relations with and marry Regina McManus, Don Smith improperly breached his fiduciary duties to Petitioner and failed to properly advise Petitioner of the consequences of said attorney's actions in regard to Petitioner's defense and actions taken by the Petitioner prior to and during the course of proceedings.

In this regard, Petitioner urges this Court to be cognizant of the recent decision by the Supreme Court of the United States in Cuyler v. Sullivan, 78-1832, which is clearly germane to the issues herein presented. In Cuyler, the Supreme Court clearly ruled that a state for purposes of ruling on an individual's Sixth Amendment right to counsel could not make a distinction between a retained or appointed attorneys. The Court stated that "since the state's conduct of a criminal trial itself implicates the state in the defendant's conviction, we see no basis for drawing a distinction between a retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers." Cuyler, supra at 27 CRL 3103. The Supreme Court further ruled in Cuyler that an individual's Sixth Amendment right to effective assistance of counsel can be abrogated because his lawyer has a "conflict of interest" which would act to deny the criminal defendant due process as required by the Fifth and Fourteenth Amendments of the United States Constitution. In pronouncing the Court's ruling, the Court reaffirmed its previous opinions in Glasser v. United States, 315 U.S. 60 (1942) and Holloway v. Arkansas, 435 U.S. 475 (1978), and stated that "a defendant who raised no objection at trial must demonstrate that an actual conflict of in-

terest adversely affected his lawyer's performance." Thereby, once an actual conflict of interest is identified, the defendant is entitled to a new trial. Cuyler specifically states that "the conflict itself demonstrates a denial of the right to have the effective assistance of counsel. A defendant who shows that a conflict of interest actually effected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. Thereby, Petitioner maintains that the identifiable conduct by Don Smith as it relates to his relationship between Regina McManus Smith and Vernon Eugene McManus, presents evidence of counsel's "struggle to serve two masters", resulting in an actual conflict of interests.

B.

The Trial Court erred in refusing Petitioner's requested charge on circumstantial evidence at the guilt/innocence stage of the proceedings in that there was no direct evidence concerning the allegation that the murder was committed for remuneration and the promise of remuneration.

Prior to the Court's charge being read to the jury, Petitioner's trial attorneys requested that the Court's charge include a charge on circumstantial evidence.(R.P.86,87) The Court refused to give that charge.

ARGUMENT AND AUTHORITY

In conjunction with the foregoing assertion, Petitioner urges that this Court consider its opinion regarding the sufficiency of the evidence to show that he committed murder for remuneration or the promise of remuneration as alleged in the indictment. In focusing on Petitioner's criminal culpability for the alleged crime, the Court analyzed his actions to determine "the actor's state of mind". In reviewing the record, this Court stated that,

"Appellant expected...Appellant could have inferred... and Appellant perceived that certain actions that would take place and result in him receiving remuneration from his Co-Defendant, Paula Cantrell Derese."

However, there was no direct evidence which supported this contention. The harm implicit in the failure of the Court to charge the jury on circumstantial evidence was compounded by the Court's amendment to the charge as raised by Petitioner's Pro Se Brief heretofore called to the Court's attention. In its charge of the Court filed May 18, 1977, wherein the Court amended the charge contained in Petitioner's indictment, and stated that the jury could find Petitioner guilty if they found from the evidence beyond reasonable doubt that the Defendant "acting alone or with another or others as a party to the offense" did commit the murder "for remuneration or the promise of remuneration." Implicit in the Court's opinion was the fact that this crucial element could be found by implication of the evidence. No evidence was presented regarding remuneration. Petitioner's asserts that this Court should not distinguish its recent opinion in Galvin v. State, 56,544(May 21, 1980) wherein this Court distinguishes this direct and circumstantial evidences cases and reversed Galvin's conviction because of the ommission of the words "and no other person" from the Court's charge significantly effected appellant's rights and constituted reversable error. In the case at bar, the failure of the Court to give a circumstantial evidence charge and amended the indictment to include the allegation that Petitioner could have acted alone, significantly effected Petitioner's rights. This issue was clearly raised by Petitioner's Pro Se Brief and was not ruled on by the Court on direct appeal. Consequently, Petitioner's asserts that this Court should reverse his trial because of the errors of the Court.

C.

**Petitioner was denied due process in that the trial court overruled Petitioner's request to present the composite drawing prepared at the direction of the State's witness, Reid Hughes, to the jury showing the**

witness' inconsistent identification and showing that the composite resembled the State's witness, Ben Taber, thereby denying Petitioner a fair and impartial trial as required by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 10 and 19 of the Texas Constitution.

Reid Hughes testified that he observed a white Monte Carlo automobile cruising in the area of the Cantrell home on the afternoon of the murders. (R.V.XVII,p.1906) He stated that the driver of the vehicle had a:

> "Full beard that was rather thick, sort of medium hair, grayish color, grayish blonde...and just, you know, looked like Foster Brooks, a man with a real beard."(R.V.XVII.,p.1911, l. 7-10)

He further described the man as appearing to be in his late 40's. (R.V.XVII,p.1918, l. 22-25) He then identified Petitioner as the driver of the white Monte Carlo automobile. (R.V.XVII,p. 1914, l. 14) In addition to the foregoing description, the witness compiled a composite with the help of a police artist, between the hours of 2:00 a.m. and 5:30 a.m. on the morning of July 25, 1976. (R.V.XVII,p.1993, l. 13-26) Petitioner attempted to offer the composite into evidence. The Court sustained the State's objections ruling that the composite was "immaterial". (R.V.XVII,p.1963, l. 21) The State did produce the composite drawn by the witness, Reid Hughes, and after identification by the witness as being the same composite compiled by him on July 25, 1976, the Petitioner again offered it into evidence. It was made a part of the record as Defense's Exhibits Nos. 30 and 31.

Petitioner alleges that the composite drawing which the Court refused to introduce into evidence was a drawing that resembled the State's witness Ben Taber. Petitioner would show that the jury would have seen that Reid Hughes actually saw Ben Taber in the vicinity of the Cantrell home on the day of the murder and not the Petitioner, Vernon Eugene McManus.

(D)

Petitioner was denied a fair and impartial trial as

guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 10 and 19 of the Texas Constitution in that no evidence was presented to support the indictment alleging that Petitioner committed murder for remuneration and the promise of remuneration.

A review of the record of Petitioner's case indicates that the only evidence showing that Petitioner expected to gain monetarily from the Cantrells' deaths, was presented by the testimony of Ben Taber and Paula Cantrell Derese. Ben Taber testified that when Petitioner contacted him to hire a "hit man", Petitioner told him that he expected to receive a portion of the estate. (R.V.XVII,p.1998, l. 4-5) Paula Cantrell Derese testified that Petitioner told her that he had hired someone to kill her parents and that he expected to be paid one-third (1/3) of the proceeds from the insurance and estate money. (R.V.XV, p.1540, l. 24) Ms. Derese further testified that while Petitioner was telling her of his plan, she did not believe him to be serious. (R.V.XV,p.1441, l. 7) The only time she believed him to be serious was prior to the time of Easter Weekend, 1976, when her parents were in Autin, Texas.(R.V.XVI,p.1457,l. 20)

However, Ms. Derese testified that she never really considered paying Petitioner anything. (R.V.XVI,p.1459,l. 13-19) She specifically denied that she ever offered or promised the Petitioner one-third (1/3) of her parents' estate in exchange for the murder. (R.V.XVI,p.1585,l. 12-25;p.1586, l. 1-12)

E.

Petitioner was denied due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution in that the trial court impermissibly amended and broadened Petitioner's indictment when the trial court's charge allowed the jury to convict Petitioner on facts not alleged in the indictment.

Petitioner was indicted for the felony offense of capital murder wherein it was alleged that he did then:

"on or about July 24, 1976, intentionally and knowingly, acting as a party with Paula Cantrell Derese

and other persons to the Grand Jury unknown, cause the death of Paul Harvey Cantrell by choking and strangling him with a cord and cutting him with a knife; said murder was committed for remuneration and the promise of remuneration, namely money from the proceeds of life insurance and the estate of Paul Harvey Cantrell and Mary Bright Cantrell."

The Trial Court's charge authorized the jury to convict the Petitioner if the jury found:

"From the evidence beyond a reasonable doubt that the defendant, Vernon Eugene McManus, acting alone or with another or others as a party to the offense as the term is hereinbefore defined, did intentionally and knowingly, in Harris County, Texas, on or about the 24th day of July, 1976, cause the death of Paul Harvey Cantrell by choking and strangling him with a cord and cutting him with a knife; you further find that said murder was committed for remuneration, or the promise of remuneration, namely money from the proceeds of life insurance and the estate of Paul Harvey Cantrell and Mary Bright Cantrell, then you will find the defendant guilty of capital murder and so state by your verdict."

Petitioner alleges that the Trial Court amended the allegation contained in the indictment in Cause Number 249,771, by alleging that the jury could convict Petitioner if it found that Petitioner was "acting alone". Petitioner maintains that this amendment to the indictment acted to deny him due process and equal protection of law in that he is entitled to notice of the charges against him to prepare for trial on the charges contained in the indictment only. The Trial Court is not allowed to amend the allegations as the case is being submitted to the jury.

Based upon Petitioner's indictment, the State had one choice, that is, Petitioner had to be acting with persons unknown to the Grand Jury and Paula Cantrell Derese in committing the offense of murder. No other charge was permitted. Thereby, the converse of Galvin, supra, is found here. In Galvin, the court left out the phrase "and no other person" in the otherwise judicially approved construction. In the case at bar, the Court added the word that the jury could find Petitioner guilty if the jury found that Petitioner acted alone in the commission of

the murders. Thereby, Petitioner maintains that he was not afforded the full benefit of a complete charge that required the jury to find that the evidence against him excluded every other reasonable hypothesis except his guilt and which was supported clearly by the indictment brought by the State.

F.

The Assistant District Attorney, Stu Stewart, engaged in prosecutorial misconduct by tampering with a State's witness through his personal relations and involvement with her, thereby creating an unmistaken bias or prejudice in the State's favor.

Petitioner alleges that during the course of the proceedings, Prosecutor, Stu Stewart, engaged in sexual relations with a State's witness, Candy Campbell. The Court of Criminal Appeals has cited the testimony of witness Candy Campbell as being corroborative of the testimony of Paula Cantrell Derese. The bias and prejudice of this witness in favor of the State's representative, based upon their relationship unbeknownst to Petitioner, clearly acted to deny Petitioner a fair and impartial trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 10 and 19 of the Texas Constitution.

G.

The Rule of Witherspoon v. Illinois, 391 U.S. 510 (1968) was violated by the exclusion for cause of prospective juror Richard Reid Blanchard, who, although not opposed to capital punishment to the extent required for exclusion under Witherspoon, could not swear that the possible imposition of the death penalty in this cause would not effect his deliberation

Petitioner asserts that the rule of Witherspoon v. Illinois, 391 U.S. 510 (1968) was violated in this cause by the exclusion for cause of at least one prospective juror, Richard Reid Blanchard. The veniremember was not opposed to capital punishment to the extent required for exclusion for cause under

Witherspoon and the District Court so found. They are nevertheless stricken really because they could not swear that the possible imposition of the death penalty in this cause would not effect their deliberation, an oath required of them by the Texas Penal Code, Section 1231b presently before the Supreme Court of the United States. In Adams v. Texas, 79-5175, 48 Law Week 338 (December 11, 1979), the Supreme Court granted certiorari in regards to the limited questions: (1) Is the Doctrine of Witherspoon v. Illinois, 391 U.S. 510, applicated procedure employed by Texas in capital cases, and (2) Did the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code, Section 1231b, violate the Doctrine of Witherspoon v. Illinois.

These questions have also been presented to the United States Court of Appeals for the Fifth Circuit in Burns v. Estelle, 78-8319, which was presented to the Fifth Circuit on January 8, 1980. Petitioner asserts that the following venire-member was stricken not because his opposition to the death penalty was so unyielding as to meet the Witherspoon test for exclusion, but merely because he was human enough to be affected in his factual deliberation by the realization that life was at stake in this controversy. Richard Reid Blanchard was administered the oath as a juror and was accepted as a member of a jury panel on March 11, 1977. (R.V.1V,p.909) On March 14, 1977, Mr. Blanchard approached the Trial Judge, I.D. McMaster, at approximately 8:25 a.m. and advised the Court that the death penalty would affect his deliberation on both the guilt question and the punishment phase of the proceedings. The following took place:

> Question: And, what I am asking you would the fact that the mandatory life or death penalty affect your deliberation on any fact issue, including that one, or those?

Answer: Yes, sir.

Question: It would?

Answer: Yes, sir.

The Court: Does the State have any questions?

Mr. Hinton: Your Honor, we think that the record is now clear of the gentleman's position, and we would ask questions only in the event that the Court was going to allow the other side to ask them also. I think the matter has been laid to rest. I am not going to pass the juror if the other side is going into the matter, but if the Court feels the record is clear at this time, we would formally exercise a challenge for cause under the record and statutes applicable in the case.

The Court: That is granted.

Mr. Vela: Note our exception to the Court excluding this juror without an opportunity of examination on the part of defense concerning whether or not -- Your Honor, could we examine this juror on a Bill for just a couple of minutes on a Bill of Exceptions?

The Court: No sir.
(R.p. 415, lines 16-25)(R.p. 416, lines 1-9)

Based on the foregoing record, Petitioner asserts that the Witherspoon Doctrine was violated which requires the reversal of his conviction.

H.

V.A.C.C.P., Art. 37.071 is unconstitutional in violation of the Fourteenth Amendment in its application in that it acts to deny individuals charged with capital due process and equal protection of law by allowing for the introduction of otherwise inadmissible evidence including evidence of unadjudicated criminal conduct, hearsay evidence at the punishment phase of a capital murder proceeding and any other statutory evidentiary rule within Texas jurisprudence.

Petitioner asserts that at the punishment phase of his trial, the State was permitted to introduce testimony relating to five unadjudicated offenses. As noted by Judge Phillips in his dissenting opinion, the emmission of the five unadjudicated offenses clearly violated the statutory prohibition of V.A.C.C.P., Art.

37.073. Judge Phillips recognized the apparent conflict between this Court's decision in Hammett v. State, 578 S.W.2d 699 (Tex.Crim.App. 1978) and Garcia v. State, 581 S.W.2d 168 (Tex. Crim.App. 1979) and V.A.C.C.P., Art. 37.073 in that the case law interpretation of Art. 37.071, V.A.C.C.P. permits the admission of an unadjudicated extraneous offenses at the punishment phase of a capital murder trial. Petitioner maintains that the evidentiary limitations of Art. 37.073, V.A.C.C.P. are applicable to all criminal cases including capital murder proceedings. This Court's rationale will allow for the usurption of clearly established evidentiary rules to allow for the introduction of relevant evidence at the punishment phase of a capital murder trial. The record reflects that, the Trial Court allowed testimony relating to an attempted extraneous extortion allegation alleged to have been committed by Appellant. (See testimony of Witness Joyce Sinclair.) Further, the Court allowed testimony concerning alleged murder attempts on State's Witness Don Sinclair. The Court allowed Joyce Sinclair to testify concerning a conversation with Petitioner regarding an alleged hit man from Dallas hired by Petitioner. Petitioner asserts that the admission of these extraneous offenses and other extraneous offenses clearly prejudiced Petitioner and caused him to receive a death sentence. As noted by Judge Clinton in Davis v. State,(62777 February 20, 1980),

> "The court is heading for constitutional trouble in its tendancy to construe 37.071 as a for receiving any and every bit of derrogatory evidence against an accused."

Petitioner asserts that the unfettered use of extraneous allegations clearly acts to deny him due process and equal protection of the law.

Numerous jurisdictions have been presented with the issue of

unadjudicated offenses at the punishment phase of capital murder trials. In State v. Goodman, 257 S.E.2d 569, the North Carolina Supreme Court recognized that their death penalty procedure:

> "Excludes the possibility of considering mere arrests or accusations as factors on aggravation." (See also Provence v. State, 337 S.2d 783 (Florida 1976, cert.denied); State v. Rust, 197 (Nebraska 528 250 N.W.2d 67, 1977)

In Cozzolino v. Tennessee, 584 S.W.2d 765 (1979), the Supreme Court of Tennessee recognized that evidence of subsequent crimes which did not result in convictions, were not admissible to establish any of the aggravated circumstances set forth in T.C.A. Sec. 39-2401 for it is relevant to none of them. Thereby, Petitioner maintains that V.A.C.C.P., Art. 37.071 is unconstitutional in its application in that it acts to deny individuals charged with capital murder, due process and equal protection of the law by allowing for the introduction of otherwise inadmissible evidence including evidence of unadjudicated criminal conduct and hearsay evidence at the punishment phase of a capital murder proceeding which would not be admissible under any other statutory or evidentiary rules within Texas jurisprudence.

1.

**Petitioner was denied due process by the denial of his Motion for Change of Venue after the presentation of overwhelming evidence that Petitioner could not obtain a fair and impartial trial in Harris County, Texas.**

The statement of facts in Petitioner's case reflects that Peri-

tioner exhausted all of his preemptory challenges and requested an additional preemptory challenge before a jury could be impanelled.

The testimony reflects further that on April 19, 1977, Petitioner was granted a hearing on his Motion for Change of Venue. Evidence from all of the local newspapers and television stations concerning their coverage of the case was presented. Numerous lawyers and judges testified on behalf of Petitioner, stating that he could not get a fair and impartial trial in Harris County, Texas. In particular, Mr. Dick DeGuerin testified that his opinion was that the Petitioner could not get a fair and impartial trial in Harris County, Texas because of the publicity surrounding the publication of Petitioner's co-defendant's confessions on two occasions. (R.V. XIV,p.795) The Honorable Felix Salazar, a Harris County District Court Judge, and, the Honorable Jo Kegans, Harris County Criminal District Court Judge, testified that it would be virtually impossible for Petitioner to have a fair and impartial trial in Harris County, Texas because of the detailed publicity concerning the case. (R.V. XIV,p.851,859). Mr. Bob Montgomery restified that he believed that Petitioner was further prejudiced by the fact that the jury selected to hear evidence in this case was not sequestered while testimony concerning the Motion for Change of Venue was being presented. (R.V. XIV,p.883,lines 24-25;p.884, 1.3)

After hearing evidence from both sides, the Trial Court overruled Petitioner's Motion for Change of Venue and ordered that the trial be set for April 25, 1977. At which time, Petitioner was not present in Court, his bond was forfeited, and a warrant was issued for his arrest. His trial was reset until May 7, 1977.

On May 7, 1977, Petitioner was in custody and he reurged his prior Motion for Change of Venue. All the newsclippings from April 25, 1977 through May 7, 1977 were introduced into evidence by stipulation as Defense's Exhibit No. 12. The State further stipulated that there was extensive news coverage concerning Petitioner's leaving the jurisdiction of the Court on or about April 25, 1977.

On May 7, 1977, the two new witnesses to support Petitioner's Motion for Change of Venue were presented by the Petitioner. George Flynn, who had testified for the State, stated that in opinion Petitioner could not get a fair trial in Harris County because of all the renewed publicity concerning Petitioner's case. (R.V.XIV,p.975,l.23) George Thomas Pihlyk testified that he was employed by Radio Station KYLF as a newscaster, broadcasting under the name of George Thomas. He stated that in the course of his employment, he interviewed prosecutors Mike Heuston and Stu Stewart on the morning of April 25, 1977 concerning Petitioner's disappearance. He stated that on April 25, 1977, he made five radio broadcasts wherein Prosecutor Stu Stewart stated:

> "he (Stewart), felt that the Judge would have no choice whatsoever, that he would have to change the venue of the case, would have to move it out of Houston."(R.V. XV.p.1090,l.7-8).

Again, the Trial Court overruled the Motion for Change of Venue.

## CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant an evidentiary hearing on proof of facts herein alleged; that Petitioner's Application for Writ of Habeas Corpus be granted in all respects, and; that the Court recommend to the Texas Court of Criminal Appeals in Austin, Texas, that Petitioner's conviction be reversed and remanded for a new trial.

Respectfully submitted,

DOHERTY, VELA, POSER, SEARS & COLLINS

By_____

STANLEY G. SCHNEIDER
TBA # 17790500
2225 LaBranch Street
Houston, Texas 77002
(713) 652-5711
ATTORNEY FOR PETITIONER

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STATE OF TEXAS I

COUNTY OF HARRIS I

BEFORE ME, the undersigned authority, on this day personally appeared VERNON EUGENE McMANUS, who, being duly sworn by me did depose and state on his oath the following:

"My name is Vernon Eugene McManus. I am the Petitioner in the above and foregoing entitled and numbered cause. I have read the above and foregoing Application for Writ of Habeas Corpus, consisting of this and fifteen (15) other typewritten pages and swear that it is true and correct."

VERNON EUGENE McMANUS

SUBSCRIBED AND SWORN TO before me, by the said VERNON EUGENE McMANUS, on this the _____ day of May, 1980.

NOTARY PUBLIC IN AND FOR
HARRIS COUNTY, T E X A S

"SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER: YES

SPECIAL ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER: YES

VERDICT OF THE JURY

We, the jury, return in open court the above answers as our answers to the issues submitted to us and the same is our verdict in this case.

/s/ Clifton H. Fridge
FOREMAN OF THE JURY"

It is therefore considered, ordered, and adjudged by the Court that the Defendant is guilty of the offense of capital murder, a felony, as found by the jury, and that the said Defendant committed the said offense on the 24th day of July, A.D. 1976, and that he be punished, as found by the jury, to-wit DEATH, and that the State of Texas do have and recover of the Defendant all costs of the prosecution, for which execution will issue, and that the Defendant be remanded to jail to await the further orders of this Court.

jp 4CP 3620171O AM

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RECORDED: VOLUME 27 PAGE 253 JUDGMENT MINUTES OF THE 179TH DISTRICT COURT OF HARRIS COUNTY, TEXAS

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Cause No. 249,771

| | | |
|---|---|---|
| EX PARTE, | I | IN THE DISTRICT COURT OF |
| | I | HARRIS COUNTY, T E X A S |
| VERNON EUGENE McMANUS | I | 179TH JUDICIAL DISTRICT |

PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE JUDGE OF SAID COURT:

Petitioner, VERNON EUGENE McMANUS, moves that he be permitted to file the attached Petition for Writ of Habeas Corpus in forma pauperis and to proceed in forma pauperis. In support of this Motion, the Petitioner states under oath the following facts:

I.

I, BERNON EUGENE McMANUS, am presently incarcerated in the Texas Department of Corrections where I am being held on a conviction for the offense of capital murder.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that he be granted leave to file and to proceed in forma pauperis in the above captioned habeas corpus proceeding.

Respectfully submitted,

_____

VERNON EUGENE McMANUS

STATE OF TEXAS I

COUNTY OF HARRIS I

BEFORE ME, the undersigned authority, on this day personally appeared VERNON EUGENE McMANUS, who, stated on oath that the foregoing Motion to Proceed In Forma Pauperis is true and correct.

GIVEN under my hand and seal of office this _____ day of May, 1980.

_____

NOTARY PUBLIC IN AND FOR
HARRIS COUNTY, T E X A S

090410 CRIMINAL JUSTICE PLANNING FUND FEE ASSESSED $10.00

Form 4101D11—Plea of Not Guilty Before Jury—Jury Assessing Punishment—10-67

MINUTES OF THE 179th DISTRICT COURT OF HARRIS COUNTY, TEXAS.

AT February TERM, 19 77 Page 25

Volume

# JUDGMENT

NO. 249771

THE STATE OF TEXAS

V.

Date March 7, 19

Vernon Eugene McManus

The Defendant having been indicted in the above entitled and numbered cause for the felony offe

capital murder

and this cause being this day called for trial, the State appeared by her District Attorney and the Defen

Vernon Eugene McManus

appeared in person and by Counsel D. Smith, M. Vela, and L. Doherty and both parties ar ready for trial. The Defendant having been previously arraigned, and in open co pleaded not guilty to the charge contained in the indictment. Thereupon a jury composed of Clifton H. Fridge and eleven others was selec panelled, and sworn; and after hearing the indictment read, the Defendant's plea of not guilty thereto evidence submitted; and after having been charged by the Court as to their duty to determine the guilt cence of the Defendant; and after hearing the argument of counsel, they retired in charge of the prope

and returned into open court on the 19th day of May 19 the following verdict, which was received by the Court and is here entered of record upon the minut "We, the jury, find the defendant, Vernon Eugene McManus, guilty of the offense of capital murder as charged in the indictment.

/s/ Clifton H. Fridge
FOREMAN"

Thereupon, the Defendant having requested in writing at the time he entered his plea of not guilty that the jury assess the punishment in connection with any other further evidence, and again charged by the Court, the jury retired in charge of the proper officer and returned into open Court on the 20th day of May, A. D. 19 77, the following verdict, which was rece by the Court and is here entered of record upon the minutes: herein.

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NO. 249711-B

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| EX PARTE | I | IN THE 179TH |
| | I | DISTRICT COURT OF |
| VERNON EUGENE McMANUS | I | HARRIS COUNTY, TEXAS |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This, a habeas corpus proceeding, pursuant to Article 11.07 of the Code of Criminal Procedure, in which Petitioner, Vernon Eugene McManus, seeks relief from confinement in the Texas Department of Corrections, where he is presently confined awaiting execution pursuant to his conviction for the offense of Capital Murder. Petitioner was convicted by jury in this Court in Cause No. 249711 and was assessed the death penalty by the Court based upon special issues that were answered by the jury.

I.

Petitioner effected a direct appeal to the Court of Criminal Appeals, and on December 5th, 1979, that Court affirmed the conviction in a published opinion. Vernon Eugene McManus vs. State, No. 58,886 "Tex. Crim.App. 1979".

II.

On June 2, 1980, Petitioner filed a petition for writ of habeas of corpus in the above styled cause. Thereafter, in June 23, 1980, this Court conducted an evidentiary hearing. The Court makes the following Findings of Fact and Conclusions of Law based upon the petition, the evidence produced at the evidentiary hearing, the record on the direct appeal which is presently on file both, in the Harris County Clerk's Office and in the Court of Criminal Appeals and Personal Recollection of the Court:

1) Regarding Petitioner's contention in ground of relief B, which is found on pages 4 and 5 in Petitioner's Application for Writ of Habeas Corpus, concerning the sufficiency of the evidence on the allegation that the murder was committed for remuneration and the promise of remuneration, this Court finds that said contention was raised on direct appeal and rejected by the Court of Criminal Appeals in its opinion affirming the conviction.

2) Regarding Petitioner's contention in ground of relief C, which is found on pages 5 and 6 of his application for Writ of Habeas Corpus, concerning the Court's refusal to admit into evidence a composite drawing prepared at the request of the State's witness, Reid Huges, this Court finds that said contention was raised on direct appeal and rejected by the Court of Criminal Appeals in its opinion affirming the conviction. Petitioner's contention that the composite drawing resembled State's witness Ben Tabor was not perfected at the time of trial and not raised on direct appeal and is therefore waived by Petitioner.

3) Concerning Petitioner's ground of error D on page 7 of Petitioner's application for Writ of Habeas Corpus regarding sufficiency of evidence to show that the murder was committed for remuneration or the promise thereof, this Court finds the said contention was raised on direct appeal and rejected by the Court of Criminal Appeals in its opinion affirming the conviction.

4) Concerning Petitioner's ground of error E in pages 7 and 8 of the Application for Writ of Habeas Corpus alleging that the Trial Court amended the indictment by allowing, in the Court's Charge, the jury to convict on facts not alleged in the indictment, this Court finds that said contention was not properly perfected at the time of trial and is therefore waived by Petitioner.

5) Concerning Petitioner's ground of error F on Page 9 of the Application of Writ of Habeas Corpus, the Court finds that: On or about July 29, 1976, Assistant District Attorney Stu Stewart was assigned by Harris County District Attorney Carol Vance to prosecute Petitioner in the Capital Murder styled STATE OF TEXAS vs. VERNON EUGENE McMANUS in Cause No. 249771. Assistant District Attorney Mike Hinton was also assigned by Mr. Vance to assist in the prosecution of Vernon Eugene McManus.

A decision was made between Mr. Hinton and Mr. Stewart that Mr. Stewart would present the prosecution's evidence on direct presentation, and Mr. Hinton would conduct the cross-examination. Pursuant to that agreement, Mr. Stewart scheduled office conferences with all prospective witnesses.

Several weeks before the trial began Mr. Stewart, during regular business hours, scheduled an office conference with Miss Kandy Campbell, a prospective prosecution witness. The office conference was conducted in the District Attorney's Conference Room, located on the Fifth Floor of the Harris County Criminal Courts Building. This was the first time that Mr. Stewart had personally met Miss Campbell. Mr. Stewart reviewed with Miss Campbell the material substance of the sworn statement she had given previously to Mr. Hinton. The interview was conducted in the usual and customary professional manner and the witness was excused after approximately one and one half hours. This was the only pre-trial conference with Miss Campbell where Mr. Stewart was present.

After the completion of voir dire and the hearing on change of venue, evidence was scheduled to commence the following Monday. Mr. McManus' flight and subsequent arrest convinced Mr. Hinton and Mr. Stewart that the possibility that

Vernon McManus would testify was very remote. Mr. Hinton then requested to assume a part of the responsibility of presenting the evidence upon the prosecution's case on direct. The responsibility was divided accordingly and it became Mr. Hinton's responsibility to present the testimony of Miss Campbell.

Miss Campbell testified substantially to the same matters which were included in her sworn statement. Miss Campbell's testimony was not crucial to the prosecution's case, but was merely cumulative of other testimony which was tendered to determine Vernon Eugene McManus' activities and statements prior to the murders, and his relationship with Miss Paula Cantrell Derese.

Mr. Stewart had no personal relations or involvement with Miss Campbell during the course of the proceedings involved in the Vernon Eugene McManus case and certainly did not have sexual relations with Miss Campbell during the course of those proceedings.

Stu Stewart did not commit prosecutorial misconduct as alleged in Petitioner's Application for Writ of Habeas Corpus.

6) Petitioner's allegation in ground of relief G, in which Petitioner argues that the rule of WITHERSPOON vs. ILLINOIS was violated by the exclusion for cause of Richard Reid Blanchard, was not properly perfected at the time of trial and therefore is waived. Petitioner did not at the time of trial or on appeal complain that Mr. Blanchard was excused in violation of WITHERSPOON vs. ILLINOIS, nor did he request any opportunity to determine whether the juror was still qualified under WITHERSPOON. Mr. Mark Vela's

sole objection on behalf of Petitioner at the time of trial and on appeal was the fact that a juror was excused after having been empaneled and sworn and that a juror has an "absolute right" to change his opinions after being selected.

7) Regarding Petitioner's contention in ground of relief H, this court finds that said contention was raised on direct appeal and rejected by the Court of Criminal Appeals in its opinion affirming the conviction.

8) Regarding Petitioner's contention in ground of relief I, this Court finds that said contention was raised on direct appeal and rejected by the Court of Criminal Appeals in its opinion affirming the conviction.

The following finds are regarding the Petitioner's contention in ground of relief A.

9) In the summer of 1976 Mark Vela was hired by Don Smith to assist in the defense of Vernon Eugene McManus. P. 10 and P. 313.

10) Mr. Vela's responsibility was to protect and preserve the record during trial, prepare and submit the various motions and argue those motions, including the motion for new trial. P. 11, 41, 52, 314-315.

11) Mr. Vela represented Vernon McManus from the time that he was initially employed in 1976 until the appellate procedure was completed in 1980.

12) Since Mr. Smith was lead counsel, Mr. Vela prepared numerous motions on behalf of Vernon Eugene McManus and had Mr. Smith sign the motions prior to filing them with the Court. P. 39.

13) During the trial Mark Vela made the majority of the objections and bills of exception. P. 28 and 315.

14) During the course of the proceedings leading up to trial, Mr. Vela had many discussions with his client, Vernon Eugene McManus. P. 14.

15) Mr. Vela participated in an investigation that was conducted by the defense team in which he, Don Smith, a professional photographer hired by the defense and Dr. Wier, a Toxicologist and Criminologist that had been recommende by Mr. Vela, went to the home of Paul and Mary Cantrell (where the murders occurred) and conducted their own crime scene investigation. P. 15, PP 326-327.

16) An investigator, Jim Mitchum, was hired by the defense. Mr. Vela and Mr. Smith discussed the results of his investigation on one or two occasions. Mr. Mitchum was asked by Don Smith to do numerous things for the defense including interviewing various witnesses and checking out several defense leads. PP 15-16, P. 324.

17) Mr. Vela was aware that a letter existed that referred to suspects that had been seen near the Cantrell's house on the night of the killings. P. 16.

18) Larry Doherty also participated, on a limited basis, in the defense of Vernon McManus. Mr. Doherty's duties included possible cross-examination of insurance company employees, cross-examination of the medical examiner and handling the federal suit seeking injunction. Mr. Doherty was not responsible for discussing the facts of the case with Vernon McManus. Mr. Doherty did not actively participate in the preparation of the defense other than carrying out his above mentioned responsibilities. PP 56-57.

19) Don Smith and Mark Vela did a great deal of work preparing the defense for Vernon McManus. Mr. Smith ~~and Mr. Vela were~~ planning to present an alibi defense through the testimony of Vernon Olney. At the last minute Vernon Olney, who was also under indictment for conspiracy to commit capital murder, refused to testify in behalf of Vernon McManus, PP. 326-332.

20) Mark Vela participated fully with Don Smith in all strategy and tactical decisions that were made during the trial. PP. 316 and 321.

21) Don Smith told Mark Vela everything of importance that Vernon McManus had told him about his case with the exception of one thing. P. 315.

22) The decision not to put on a defense was a collective decision of all three attorneys. The decision was unanimous. PP. 332 and 333.

23) The decision not to put on a defense was made for the following reasons:

a) Mr. Vela believed strongly that there was reversible error in the state's case.

b) Vernon Olney's refusal to testify.

c) The defense lawyers felt that Vernon McManus could not stand up under cross-examination by Stu Stewart. PP 334-339.

24) Don Smith did not suggest to Vernon McManus that he should flee the jurisdiction of the Court. PP 340 & 355.

25) Don Smith did not assist Vernon McManus to flee the jurisdiction of the Court. PP 340 and 355.

26) Don Smith had no knowledge of Vernon McManus' plan to flee the jurisdiction of the Court. P. 355.

27) Don Smith did not give Vernon McManus any money on Saturday, April 23, 1977. PP. 348-353.

28) At no time after the conclusion of the trial did any of the attorneys, including Mark Vela who was responsible for filing and arguing all motions, discuss or become aware of any grounds for a new trial that had not been perfected during trial. P. 362.

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29) On June 20, 1977, the Court overruled Vernon McManus' motion for new trial. No evidence was presented on the motion for new trial since none of Mr. McManus' attorney were aware of any grounds that had not been perfected during the trial. P. 362, 365-366, 363,23 P. 418.

30) Neither Mark Vela or Don Smith saw or read the newspaper article that was marked as Defense Exhibit No. 1. P. 23.

31) Don Smith met with Regina McManus shortly after the trial was over for the purpose of explaining to her why the defense team had decided not to put on a defense and why they had decided not to put on any evidence on punishment. This meeting occurred in Don Smith's office and in a club across the street from Mr. Smith's office.

32) On the morning of June 20, 1977, the day Vernon McManus' motion for new trial was ruled by the court, Don Smith had an automobile accident in which he injured his knee. As a result of the injury to his knee Mr. Smith received medical treatment that morning from Dr. James Keatts. Dr. Keatts diagnosed Mr. Smith's problem as a bruise of the patella. Dr. Keatts gave Mr. Smith some pain medication and suggested that he go home and stay off the injured knee. Mr. Smith called his secretary and told her to call Mark Vela and inform him that Mr. Smith would not be able to appear in court. Mr. Smith then went home. PP 364, 302, and 303.

33) Mr. Vela and Mr. Smith were appointed by the Court to represent Petitioner on Appeal as soon as the Court became aware Petitioner was indigent. P. 29. NOT TRUE

34) After the arrest and indictment of Vernon McManus for Capital Murder, Regina McManus became aware that Vernon had borrowed money on their automobiles without her knowledge or approval. At about that same time Mrs. McManus learned that Vernon McManus had begun going out with other women.

These two situations lead to deterioration of Vernon and Regina McManus' marriage. P. 177-178, 245, 265, 269, 272, 273.

35) During voir dire examination, Regina McManus discussed the possibility of divorce with Vernon McManus. It was at this time they decided that, in the event there was a divorce, Don Smith would handle it. PP. 371.

36) In April, 1977, immediately prior to the scheduled beginning of his trial for Capital Murder, Vernon Eugene McManu fled the jurisdiction of this Court. Several days later, Mr. McManus was arrested in a hotel room in Jacksonville Beach, Florida. At the time of his arrest Mr. McManus was in bed with a woman.

Upon hearing of Mr. McManus' arrest and the surrounding circumstances, Regina McManus decided that her marriage must end. Regina McManus met with Vernon several days after his arrest and informed him of her decision to divorce him. PP 249 and 276.

37) Vernon McManus was aware that his and Regina's marriage would be terminated at the conclusion of the trial. He had discussed this fact with Don Smith during voir dire and an agreement was reached that Don Smith would handle the divorce at no cost to either Regina or himself. Vernon McManus knew Don Smith's representation of Regina in the divorce and acquiesed in that arrangement. Vernon McManus never contested the divorce itself, his only opposition in the divorce was to having his daughter's name changed. P. 160, 173, 358.

38) Even though Regina McManus had decided to divorce Vernon McManus, she agreed to stay with him and not file for divorce until the trial ended. Regardless of all their marriage problems, Vernon was the father of her child and she wanted to do what she could to help him. PP 250 and 358.

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39) The decision to file the divorce action in Regina McManus' name was made after the trial. Since Vernon McManus would immediately be transferred to the Texas Department of corrections and would not be available for a court appearance, Mr. Smith felt that it would be expeditious to file the divorce in Mrs. McManus' name rather than in the name of Vernon McManus P. 358-359.

40) On May 27, 1977, at 11:27 a.m., Don Smith filed the original divorce petition in the divorce of Regina McManus and Vernon McManus. PP 93.

41) Approximately October 14, 1977, Robert J. Montgomery an attorney who practices in Pasadena, Texas, began representing Regina McManus in the divorce action against Vernon McManus Mr. Montgomery was asked to take over Mrs. McManus' divorce by Don Smith. Don Smith had filed the divorce as a favor to Vernon and Regina McManus. When Mr. Smith was informed by Regina McManus that she would like to have her daughter's name changed in the divorce proceeding, he realized that this action would be contested by Vernon McManus. Since Mr. Smith had only agreed to handle the divorce if it was an agreed, uncontested divorce and since if he continued to represent Regina McManus it would create a possible conflict of interest, Don Smith asked Robert J. Montgomery to take over the case. After Mr. Montgomery accepted the case on November 14, 1977, Don Smith withdrew from the case and ceased representing Regina McManus. PP 89, P 260-262, P 359 and 361.

42) On November 29, 1977, Mr. Montgomery filed an amended petition in the divorce action in which he requested a change of name for Vernon and Regina McManus' child. PP 101 and 102.

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43) Prior to and during Vernon McManus' trial, Regina McManus and Don Smith only met alone one time. The meeting occurred shortly after Don Smith had been hired to represent Vernon. The purpose of the meeting was for Mr. Smith to determine whether Regina was going to remain with Vernon and be supportive in the coming months. The meeting lasted two hours. P 309-310.

not true

44) The first time that Regina McManus and Don Smith met on a social basis was after the trial of Vernon McManus had ended. The meeting occurred during the week of June 13, 1977, in Beaumont, Texas. PP 276-279.

45) During the week of June 13, 1977, Don Smith and Larry Doherty were trying a lawsuit in Beaumont, Texas. The opposing attorney, Bob Worthum was Regina McManus' college sweetheart. When Mr. Smith learned of the friendship between Regina McManus and Bob Worthum, he telephoned Regina and invited her to join them for drinks. Regina McManus accepted the invitation. PP. 61, P 63, P 387-390.

46) Later in the evening, Larry Doherty went to a movie. When Mr. Doherty returned to his motel room, which he and Don Smith were sharing, he observed Don Smith and Regina McManus in bed. PP.66.

47) Several months later Larry Doherty told Mark Vela that he had seen Don Smith and Regina McManus in bed together. PP.67.

48) During the week of June 13, 1977, in Beaumont, Texas, Don Smith had a confrontation with Michael J. Falks concerning the Vernon McManus case. The confrontation occurred in the restaurant where Don Smith, Regina McManus and Larry Doherty were having a few drinks. Michael Falks became aware that Don Smith had represented Vernon McManus in his Capital Murder trial and made several comments that were adverse to Mr. McManus. Mr. Smith became offended by Mr. Falks' comments

and a heated discussion ensued. This Court finds as a fact that Don Smith did not tell Mr. Falks that he was a "fucking them both, I have her and I'm keeping him out of the way". PP 257 and 390-395.

49) Prior to and during the trial, Regina McManus did not like Don Smith as a result of her belief that Mr. Smith was willing to sacrifice her personal life and that of her childs in order to help his case. PP 276.

50) Regina McManus and Don Smith did not develope an emotional relationship until several months after the meeting in Beaumont, Texas, during the week of June 13, 1977. PP 276 and 436-437.

51) During the trial Vernon McManus felt that Don Smith was doing a good job of representing him.

52) Vernon McManus is dissatisfied with the representation he received by Don Smith during

of trial Mr. Smith would not talk to him before or after court was convened. Mr. McManus also maintains that Mark Vela and Larry Doherty would not talk to him during the same period of time.

b. Mr. McManus maintains that Mr. Smith never discussed with him any of the witnesses the State would call.

c. Mr. McManus maintains that he was not provided a copy of the investigator's report and that Mr. Smith never discussed with him what the investigator had or had not discovered.

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d. Mr. McManus maintains that neither Mr. Smith nor any of the other attorneys discussed with him the defense witnesses or rebuttal witnesses or anything regarding any defense that might be offered.

e. Mr. McManus maintains that he was dissatisfied with the collective decision of his attorneys not to put on a defence.

Mr. McManus expressed no other dissatisfaction with Mr. Smith's representation during his trial. PP 193, 196, 198, 199.

53) Vernon McManus asked, for the first time, that Don Smith be removed as his attorney after he learned of the relationship between Regina McManus and Don Smith. Mr. McManus' request was made because of his discovery of the relationship and not because of dissatisfaction with Don Smith's representation. PP 191.

## III. CONCLUSION

Since this Court presided over the Capital Murder trial, which is the subject of this writ hearing, the Court finds as a fact, from personal knowledge, that the in-court conduct of the trial by Mr. Smith was of a very high standard as exhibited in his cross examination of the State's key witness, PAULA DERESE.

The possibility of a conflict of interest is insufficient to inpugn a criminal conviction. In order to establish a violation of the 6th Amendment, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. CUYLER VS. SULLIVAN, United States Supreme Court, May 12, 1980.

In the case before the Court an actual conflict of interest has not been identified nor had there been any showing that anything adversely affected Don Smith's performance in representing Vernon McManus.

The 6th Amendment Right to reasonably effective counsel does not mean "errorless counsel" or counsel judged in effective by hindsight. Ultimately, the final determination of whether or not counsel rendered reasonably effective assistance of counsel requires an inquiry into counsel's actual performance. CLARK VS. BLACKBURN, 5th Circuit Court of Appeals, June 18, 1980.

The Court, in this hearing, has conducted an inquiry into the actual performance of Don Smith in conducting the defense. Based upon the totality of the circumstances and the entire record the Court finds as a fact that Don Smith rendered very effective assistance to Vernon McManus in his representation for the offense of Capital Murder.

The Defendant in his hearing was only able to raise speculative and inconcrete claims of "what might have been - if". The defendant has not pointed to one specific example of ineffectiveness.

The Court concludes that Petitioner has failed to establish that his conviction was unlawfully obtained, and therefore RECOMMENDS that his petition for Writ of Habeas Corpus be in all things denied.

Done on this 21st day of November, 1980.

I. D. McMaster

HONORABLE I. D. McMASTER, JUDGE
179th District Court
Harris County, Texas

concern which may have resulted from the delay must be considered in light of the fact that the prosecution was based upon a speeding ticket which resulted in a $22.00 fine at his first trial. We do not deem this a particularly serious or grave offense.

Petitioner does contend that the delay impaired his defense, resulting in prejudice to him. He asserts in his petition:

"The passage of time has caused Defendant and his witnesses to have less recall of the transaction alleged to have occurred on the date charged in the complaint; Defendant has discarded his file on this matter, as Defendant's law office routinely discards traffic files that have not been tried after four years. Defendant therefore, does not have adequate information regarding the transaction to properly try this cause."

He also contended that he would not be able to properly cross-examine witnesses against him.

While it is reasonable to assume that petitioner was somewhat prejudiced by the delay, it appears that one reason therefore was because he, himself, discarded his file in the case. Further, the fact that the trial which petitioner sought was a trial de novo merits some consideration. Petitioner had already had one trial on the offense and had had an opportunity to present his evidence and observe the prosecution present theirs. This fact, plus the fact that petitioner discarded his file on his own case, may be considered in mitigation of any prejudice he suffered as a result of the passe of time.

[3, 4] In applying the balancing test of *Barker v. Wingo*, we consider: there was a substantial delay between the appeal filed County Court and the trial de novo; however, the prosecution set the cause for trial several times during this period; the reason why trial was not had on these dates does not appear in the record; petitioner is an attorney, well aware of the nature of legal proceedings; petitioner never asserted his right to a speedy trial during this period of time; the decision not to urge his right to a speedy trial de novo may have been a deliberate decision, calculated to result in a dismissal of the cause; petitioner's own action in discarding his file on the cause, and the fact that petitioner had already had a trial in the cause may be considered in mitigation of any prejudice he suffered as a result of the delay. In applying the balancing test of *Barker v. Wingo*, we conclude that petitioner has failed to show that he was denied his right to a speedy trial.

The relief sought is denied.

ROBERTS and PHILLIPS, JJ., concur in the result.

Vernon Eugene McMANUS, Appellant,

v.

The STATE of Texas, Appellee.

No. 58886.

Court of Criminal Appeals of Texas, En Banc.

Dec. 5, 1979.

Rehearing Denied Jan. 16, 1980.

Defendant was convicted before the 179th Judicial District Court, Harris County, I. D. McMaster, J., of capital murder and was sentenced to death, and he appealed. The Court of Criminal Appeals, W. C. Davis, J., held that: (1) evidence sufficiently established that murder was committed for remuneration or the promise thereof; (2) accomplice witness' testimony was sufficiently corroborated; (3) refusal to grant defendant change of venue on basis of pretrial publicity, including publicity in regard to accomplice's confessions, was not abuse of discretion; (4) trial court did not abuse its discretion in placing limitations on questioning of prospective juror in regard to pretrial publicity; (5) refusal to admit com-

posite picture, which state witness had helped prepare, for purpose of impeaching witness' identification of defendant was not error; (6) refusal to allow defendant to cross-examine state witness concerning her letter, which expressed her intention to leave her husband and her anger towards him, was not error; and (7) certain testimony, including testimony that defendant later told his former girl friend that he had intended to kill her husband during an encounter but was prevented from doing so by proximity of a police officer was relevant evidence of defendant's prior criminal conduct and was admissible for jury's consideration during punishment phase of trial.

Judgment affirmed.

Phillips, J., dissented and filed opinion.

Clinton, J., dissented and filed opinion in which Roberts, J., joined.

1. Homicide ⇐250

Evidence, in proceeding in which defendant was convicted of capital murder, was sufficient to establish that defendant committed murder for remuneration or the promise of remuneration as alleged in indictment. V.T.C.A., Penal Code § 19.03(a)(3).

2. Criminal Law ⇐511.1(1)

Mere showing that an offense has occurred is not sufficient corroboration of an accomplice witness' testimony. Vernon's Ann.C.C.P. art. 38.14.

3. Criminal Law ⇐511.1(2)

It is not necessary that corroboration of an accomplice's testimony directly link accused to the crime or be sufficient in itself to establish guilt, but, rather, the corroboration need only make the accomplice witness' testimony more likely than not. Vernon's Ann.C.C.P. art. 38.14.

4. Criminal Law ⇐511.1(7)

In proceeding in which defendant was convicted of capital murder, accomplice witness' testimony was sufficiently corroborated by evidence other than testimony given by another witness who also may have been an accomplice witness. Vernon's Ann. C.C.P. art. 38.14.

5. Constitutional Law ⇐265
Indictment and Information ⇐71.2(2)

In regard to indictments, fundamental protections of adequate notice and due process require careful examination and consideration from perspective of accused. Vernon's Ann.C.C.P. arts. 21.02, 21.11; U.S. C.A.Const. Amend. 14.

6. Indictment and Information ⇐71.2(3)

In considering sufficiency of indictment, it is not sufficient to say that accused knew with what offense he was charged, but, rather, court must inquire as to whether face of the instrument set forth in plain and intelligible language sufficient information to enable accused to prepare his defense. Vernon's Ann.C.C.P. arts. 21.02, 21.11.

7. Homicide ⇐127

Indictment, which charged that defendant "* * * did then and there unlawfully, intentionally and knowingly, acting as a party with [certain person] and other persons to the Grand Jury unknown, cause the death of [victim] by choking and strangling him with a cord and cutting him with a knife; and said murder was committed for remuneration and the promise of remuneration * * *" was to be interpreted as alleging that defendant committed the murder and was promised compensation by another to do it; indictment was not susceptible to interpretation that defendant employed another to do the killing or promised another person compensation for doing it. V.T.C.A., Penal Code § 19.03(a)(3).

8. Indictment and Information ⇐71.4(5)

Indictment, which charged that defendant "* * * did then and there unlawfully, intentionally and knowingly, acting as a party with [victim's daughter] and other persons to the Grand Jury unknown, cause the death of [victim] * * * and said murder was committed for remuneration and the promise of remuneration, namely, money from the proceeds of life insurance and the estate of [such victim and his wife]," gave defendant sufficient notice as to who promised him the remuneration. arts. 21.02, 21.11; § 19.03(a)(3).

9. Criminal Law ⇐1
State's filing of vits, in regard to an charge of venue, rai be tried and resolve non's Ann.C.C.P. art

10. Criminal Law ⇐
In regard to m venue supported by by State's controve court's decision on within discretion of be reversed on a sh has abused its discre C.P. arts. 31.03, 31.0

11. Criminal Law ⇐
If no controvert state, defendant is venue as a matter o C.P. arts. 31.03, 31.

12. Criminal Law ⇐
If defendant p his motion for ch objecting that there tried and that he is matter of law due t controverting affi right to per se cha Ann.C.C.P. arts. 31

13. Criminal Law
Where accused ing on his motion ground that he wa venue as matter o has been uncontro not urge court to of law, but, rathe for a hearing on t his right to chan law. Vernon's An

14. Criminal Law
Question wh should be grante publicity is one o

who promised him or was to supply him remuneration. Vernon's Ann.C.C.P. a. 21.02, 21.11; V.T.C.A., Penal Code 9.03(a)(3).

**Criminal Law ⇐134(3)**

State's filing of controverting affida-, in regard to an accused's motion for nge of venue, raises an issue of fact to tried and resolved by trial court. Ver-'s Ann.C.C.P. arts. 31.03, 31.04.

**Criminal Law ⇐121, 1150**

In regard to motion for a change of ue supported by affidavits and opposed State's controverting affidavits, trial rt's decision on merits of the motion is hin discretion of the court and will only reversed on a showing that trial court abused its discretion. Vernon's Ann.C. '. arts. 31.03, 31.04.

**Criminal Law ⇐134(3)**

If no controverting affidavit is filed by te, defendant is entitled to a change of ue as a matter of law. Vernon's Ann.C. '. arts. 31.03, 31.04.

**Criminal Law ⇐145**

If defendant proceeds to a hearing on motion for change of venue without cting that there is no issue of fact to be d and that he is entitled to a change as a tter of law due to State's failure to file a troverting affidavit, he waives such ht to per se change of venue. Vernon's n.C.C.P. arts. 31.03, 31.04.

**Criminal Law ⇐145**

Where accused did not object to a hear- on his motion for change of venue on und that he was entitled to a change of ue as matter of law because his motion been uncontroverted and where he did urge court to grant motion as a matter law, but, rather, persisted in his request a hearing on the motion, accused waived right to change of venue as matter of '. Vernon's Ann.C.C.P. arts. 31.03, 31.04.

**Criminal Law ⇐126(1)**

Question whether change of venue ould be granted because of prejudicial blicity is one of constitutional dimension and the test to be applied is whether outside influences affecting the community's climate of opinion as to a defendant are so inherently suspect that resulting probability of unfairness would require suitable procedural safeguards.

**15. Criminal Law ⇐121**

In proceeding in which defendant was convicted of capital murder, refusal to grant defendant change of venue on basis of pretrial publicity, including publicity in regard to accomplice's confessions, was not abuse of discretion, in light of fact that all the information contained in the news reports was accurate and was apparently published for purpose of informing the public of current events and that the testimony with respect to whether defendant could obtain a fair trial in the community because of pretrial publicity was conflicting. V.T.C.A., Penal Code § 19.03(a)(3).

**16. Criminal Law ⇐121**

In proceeding in which defendant was convicted of capital murder, refusal to grant defendant a change of venue on basis of newspaper reports concerning his flight from the jurisdiction and subsequent apprehension was not abuse of discretion, in light of fact that parties had stipulated that witnesses who testified at previous hearing on a motion for change of venue would testify as to the same matters as they had at the previous hearing and that there was testimony at such hearing that defendant could receive a fair trial in the county. V.T.C.A., Penal Code § 19.03(a)(3).

**17. Criminal Law ⇐1115(2)**

Defendant failed to preserve error, in regard to imposition of limitations on his voir dire examination of two prospective jurors with respect to pretrial publicity, where he failed to propound to trial court or to let the record reflect what questions concerning pretrial publicity he was not allowed to ask.

**18. Jury ⇐131(2)**

Though constitutional right to be represented by counsel encompasses right of counsel to question members of jury panel in order to intelligently exercise peremptory

ry challenges, trial court, within its sound discretion, may impose reasonable restrictions on exercise of voir dire examination. Vernon's Ann.St.Const. art. 1, § 10; U.S.C.A.Const. Amend. 6.

19. Jury ⇐131(15)

Duplicitous questions during voir dire may, within court's discretion, be limited. Vernon's Ann.St.Const. art. 1, § 10; U.S.C.A.Const. Amend. 6.

20. Jury ⇐131(11)

In proceeding in which defendant was convicted of capital murder, in which voir dire examination was especially lengthy, in which trial court questioned prospective juror concerning extent of pretrial publicity that he was familiar with and in which further inquiry was made concerning whether he had formed any opinion or conclusion of defendant's guilt, prohibiting the defense from again questioning the juror about pretrial publicity was not abuse of discretion. V.T.C.A., Penal Code § 19.03(a)(3); Vernon's Ann.St.Const. art. 1, § 10; U.S.C.A.Const. Amend. 6.

21. Jury ⇐131(11)

In proceeding in which defendant was convicted of capital murder, in which voir dire examination was especially lengthy, in which trial court examined prospective juror at length concerning pretrial publicity that he was familiar with and in which court carefully inquired whether he had formed any conclusion as to defendant's guilt or innocence, trial court's limitation of duplicitous questioning of juror in that regard was not abuse of discretion. V.T.C.A., Penal Code § 19.03(a)(3); Vernon's Ann.St.Const. art. 1, § 10; U.S.C.A.Const. Amend. 6.

22. Jury ⇐131(7)

Under statute dealing with disqualification of prospective jurors and challenges for cause, the statutory procedure used to determine whether a juror is disqualified applies only when a prospective juror states that he has formed a conclusion as to guilt or innocence of the defendant; the statute does not give the defense absolute statutory authority to examine jurors about each bit of information recounted in the media. Vernon's Ann.C.C.P. art. 35.16.

23. Jury ⇐108

In proceeding in which defendant was convicted of capital murder, trial court did not abuse its discretion in granting challenge for cause directed at juror, who expressed reservations about death penalty after he was sworn and impaneled as the second juror in the cause, and did not err in failing to discharge the first juror. V.T.C.A., Penal Code §§ 12.31(b), 19.03(a)(3).

24. Jury ⇐131(11)

In proceeding in which defendant was convicted of capital murder, in which trial court granted challenge for cause directed at juror after he expressed reservations about death penalty and in which defendant did not request opportunity to show that such juror was still a qualified juror, refusal to allow defendant to inquire of the juror in regard to his "change of heart" with regard to death penalty was not error. V.T.C.A., Penal Code §§ 12.31(b), 19.03(a)(3).

25. Criminal Law ⇐1035(6)

Defendant's objection, which was made after completion of questioning of jurors in capital murder prosecution and which was "* * * that the questioning has not been in compliance with [certain statute] and the true determination of any pretrial publicity has not been made," came too late and was too general to preserve any complaint that trial court had not adequately inquired into effects on the jurors of defendant's flight from the jurisdiction. Vernon's Ann.C.C.P. art. 35.16; V.T.C.A., Penal Code § 19.03(a)(3).

26. Jury ⇐131(10)

In proceeding in which defendant was convicted of capital murder, trial court, in polling jury individually and thereby determining that publicity in regard to defendant's flight from the jurisdiction did not cause any jurors to form any conclusion as to defendant's guilt or innocence, had adequately protected defendant's rights. V.T.C.A., Penal Code § 19.03(a)(3); Vernon's Ann.C.C.P. art. 35.16.

27. Criminal Law ⇐438(1)

In capital murder prosecution, refusal to admit composite picture, which witness had helped prepare, for purpose of impeaching witness' identification of defendant was proper; the picture was immaterial, in light of witness' testimony that the picture did not fairly and accurately represent person seen by witness. V.T.C.A., Penal Code § 19.03(a)(3).

28. Criminal Law ⇐627.9(1)

Production of grand jury testimony lies within sound discretion of trial court and the accused may be permitted to inspect such testimony where some special reason exists or where a particularized need is shown so as to outweigh traditional policy of grand jury secrecy.

29. Criminal Law ⇐627.9(4)

In capital murder prosecution, overruling of defendant's request for production of grand jury testimony of state witness was not error, in view of failure to show a particularized need for the grand jury testimony and in light of fact that such testimony was entirely consistent with witness' testimony at trial. V.T.C.A., Penal Code § 19.03(a)(3).

30. Witnesses ⇐386

In capital murder prosecution, refusal to allow cross-examination of state witness concerning letter, which she had written several years previously when she and her husband were separated for one day, which was never mailed and in which she expressed her intention to leave husband and her anger towards him, was proper; such letter did not impeach her testimony that, during the months before her parents were murdered, she desired to reconcile with husband. V.T.C.A., Penal Code § 19.03(a)(3); U.S.C.A.Const. Amend. 6.

31. Witnesses ⇐383, 405(1)

Witness may not be impeached on immaterial and collateral matters.

32. Witnesses ⇐383

In capital murder prosecution, refusal to admit state witness' letter, which made references to fact that two of her husband's relatives had been involved in a murder and to fact that one of perpetrator's wives had turned them in and in which there was an implication that wife might be involved in some accident thereafter, for purpose of impeaching witness' testimony that she never had knowledge of any murder which was made to look like an accidental death was proper; the letter was immaterial and not probative as to any issue in the case. V.T.C.A., Penal Code § 19.03(a)(3); U.S.C.A.Const. Amend. 6.

33. Criminal Law ⇐1119(2)

Defendant, who was convicted of capital murder, was not entitled to relief on appeal on theory that trial court erred in not allowing him opportunity to question state witness about letters for purposes of perfecting his bill of exception where defendant, in hearing out of presence of jury, was given ample opportunity to question witness about letters, questions which defendant proposed in his bill of exceptions were answered by witness during such hearing and there was no indication that defendant requested to examine witness further or that his examination of her was limited by trial court. V.T.C.A., Penal Code § 19.03(a)(3); U.S.C.A.Const. Amend. 6.

34. Criminal Law ⇐1090.8

No error was shown in regard to sustaining objection to question whether state witness had ever forged her husband's name to an instrument where accused failed to perfect a bill of exception concerning any charges pending against witness with respect to such a forgery.

35. Criminal Law ⇐1043(3)

Where defendant's ground of error based on contention that trial court erred in failing to instruct that a state witness was an accomplice witness as a matter of law differed from accused's objections raised in trial court, nothing was preserved for review. Vernon's Ann.C.C.P. art. 38.14.

36. Homicide ⇐354

Trial court has wide discretion in admitting evidence at punishment phase of capital murder trial.

37. Homicide ⇐354

In capital murder prosecution, testimony that defendant had attempted to extort money from his girl friend and had threatened her, that he told her of his intent to murder her husband, that husband had an encounter with defendant, whom husband recognized even though defendant was disguised, and that defendant later told girl friend that he had intended to kill husband during the encounter but was prevented from doing so by proximity of a police officer was relevant evidence of defendant's prior criminal conduct and was admissible for jury's consideration during punishment phase of the trial. V.T.C.A., Penal Code § 19.03(a)(3); Vernon's Ann.C.C.P. arts. 37.071, 37.071(b)(2).

38. Criminal Law ⇐1169.2(2)

In capital murder prosecution, any error in admitting defendant's former girl friend's testimony that she received telephone call in which unidentified caller stated that he did not appreciate the way that she was treating defendant and that if anything happened to him, caller would return from certain city and kill girl friend and her family was harmless, in light of the substantial testimony concerning defendant's repeated threats, expressed intent to do harm to, and criminal acts toward girl friend and her husband. V.T.C.A., Penal Code § 19.03(a)(3).

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Mark Vela and Stanley G. Schneider, Houston, Don Smith, Baytown, for appellant.

Carol S. Vance, Dist. Atty., Michael C. Kuhn, Stu Stewart and Michael J. Hinton, Asst. Dist. Attys., Houston, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

W. C. DAVIS, Judge.

This is an appeal from a conviction for capital murder, wherein the punishment was assessed at death. Appellant was convicted of acting with Paula Cantrell Derese to cause the death of Paul Cantrell for remuneration or the promise thereof, which was to be money from the proceeds of life insurance and the estate of Paul and Mary Cantrell.

[1] In his fifteenth ground of error, appellant challenges the sufficiency of the evidence to show that the murder was committed for remuneration or the promise thereof.

In the early morning hours of July 25, 1976, the bodies of the deceased, Paul and Mary Cantrell, were discovered in their home by their daughter, Paula Cantrell Derese. They were found lying on the floor of their den, and both had been strangled and had had their throats cut. Four days later, Paula, the only child of Paul and Mary, gave a statement in which she implicated herself and appellant in the murders. Paula, in testifying against appellant, stated that she had pled guilty to the murders of her parents, and that by her conduct, she had encouraged the commission of the crime. She stated that she admitted her part in the crime because she could not have taken her parents' money and lived like she wanted to.

Paula first met appellant in 1970, when she lived in Beaumont and worked for Lamar University, where appellant was an assistant football coach. She later married Herbie Derese and had a son, Chad, in December of 1973. Her parents did not approve of Paula's marriage to Herbie. In 1975, Paula and Herbie separated and Paula, with her son, moved into her parents' home in Baytown. She lived there with her parents until their deaths in July of 1976. During this period of time, there was conflict between Paula and her parents, over Paula's desire to reconcile with her husband. There was testimony that Paula's father had threatened to wage a court battle for the legal custody of Chad if Paula reconciled with Herbie.

In January or February of 1976, appellant reestablished contact with Paula. Paula testified that at this time, she refused to go out with him. However, she talked to

him several times on the telephone. A few weeks later, she had a serious argument with her parents about Herbie and was upset. She agreed to have lunch with appellant, and at this time discussed her problems with her parents with him. She testified that she told appellant that she would do anything to be free of her parents. Appellant responded that he knew of a way that that could be taken care of so that she would not have to worry about that again. Appellant also asked her about how much insurance Herbie had, and whether she wanted him killed. Paula responded that she did not want Herbie killed.

Sometime during February, appellant cosigned a $1,500 loan which Paula took out.

About two weeks after their first meeting, during which time Paula and appellant talked on the telephone several times, they met again for lunch. At this meeting, appellant told Paula that things had been taken care of so that she would not have to worry about it again. He told her that he knew some people who killed people for money, and that there had already been a payment made to have her parents killed. Paula testified that she was supposed to pay appellant out of the proceeds of her parents' estate and life insurance; appellant told her that he wanted one-third. She testified that although she never expressly told him that she would pay him, she "let it slide." She stated that at this time, she did not believe that he was serious.

In March of 1976, appellant and his business partner, Vernon Olney, came to Paula's parents' house to discuss a business matter, and Paula, with her mother, showed appellant through the house.

Paula and appellant maintained communication, and in April, Paula went to work for appellant as his secretary in his plywood brokerage business. She testified that at this time, she thought appellant was serious about having her parents murdered.

On Easter weekend, Paul and Mary had made plans to meet some friends in Austin to play golf. Prior to this weekend, appellant had a discussion with Paula about insurance double indemnity and "making something look like an accident." Paula stated that she did not know what this meant. Appellant knew of the deceased's plans Easter weekend, and Paula told him the motel in which they would be staying. Paula testified that when her parents left for their trip, she thought that something was going to happen to them that weekend. She thought that appellant was serious about murdering them. When questioned about whether she tried to warn them, she stated that she just could not tell them about the situation. She admitted that this was when she started encouraging the murders of her parents. She testified that she turned her back on the situation. Still, she called her parents several times that weekend, and they returned home safely.

In May, appellant discussed with Paula borrowing money from a credit union; this money was to be used to pay the person who was supposed to do the killings. He also told her that the "contact person" or "hit man" was sick in Ohio at that time.

During this time, Paula also became familiar with the name "Ben T." and knew that he was somehow involved in the scheme to have her parents murdered.

During June, appellant was drinking heavily and was gone frequently from his business. Testimony showed that appellant was trying, but was not able to have the murders done soon. He told Paula that he should not have counted upon anyone else to do the killings, that he should have done them himself. He said that he would walk up to the deceased's house and act like he was going to talk about business and kill them himself.

On Friday, July 23rd, Paula talked to appellant on the telephone from her house. She had observed him drive by her house that day. Appellant told her that "the man is in the area" and told her to leave the house. He had previously warned her not to be in the house when "the man" came. That evening, Paula went over to a friend's house and returned home shortly before midnight.

Paula again talked to appellant on Saturday, July 24th, and told him that she had a date that evening; she further told him that her parents would be at home that night. That night, when she returned home from her date, she discovered the bodies of her parents in their den. Over the next few days, appellant visited Paula several times, and repeatedly told her to "keep her mouth shut and not to crack." He then told her how the murders had occurred and that he had been present during them. According to his statements to Paula, appellant had rented a car from the Houston airport and had picked up two men. They then proceeded to the Cantrell house. All of them wore gloves. They had used a pipe to hit the victims in the head, and then had cut their throats. The three had started to ransack the house, but a car pulled up across the street, so they left. Appellant had also made a comment that if one hair was found on the bodies of the deceased, "he [appellant] was dead."

In her written confession, Paula stated that during the months that she worked for appellant, "he always talked about it [the murders] . . . He kept talking about it all the time until it happened." On the day of the murders, appellant called and "told me that the man had called him Friday and said three is a crowd. I knew what he meant because he had told me in the past that it might not matter if I and Chad were there. He was afraid something would happen to me and he couldn't get any insurance money."

In her testimony at trial, Paula denied that she expressly told appellant that she would pay him, or that she ever expressly promised to pay him. She testified that, instead, he had *told* her that she was to pay him one-third of the proceeds of the estate. She testified that she had not thought through *how* she was to give him the money, because "the reality of it never really hit [her]."

Paula was examined extensively about her involvement in the murders, beyond her confession to the crime and entry of pleas of guilty to the murders. She was asked,

"Q. To you, then, knowledge [of the planned murders] is encouragement? In other words, knowing about it and you didn't tell somebody?

"A. [Paula] That's right.

"Q. Is this what you meant?

"A. Yes.

"Q. And so far as you are concerned, that is what has really brought you to this courtroom, is that you had knowledge but you never really encouraged . . . ?

"A. And by his saying that he got a third of the estate and me agreeing to that, that's right.

"Q. Oh, you agreed to it?

"A. Well, I guess. I didn't do anything about it."

Ben Tabor, an acquaintance of appellant's, testified that in March appellant had approached him about finding a professional killer or "hit man." Appellant told Tabor that two people were to be killed, and that their daughter would be the beneficiary, and that he was to receive one-third of the estate. The recorder further reflects that appellant twice made payments of $6,000 each to Tabor to give to the "hit man" whom Tabor said he had procured for appellant.

Donna French, appellant's girlfriend in June and July, testified that during these months, appellant had mentioned leaving town or vacationing somewhere. However, appellant told her that this would not be until around mid-August "because he was going to run into some money."

Candy Campbell, a friend of Paula's and an acquaintance of appellant's, testified that she and Paula had planned a trip to California during June. Paula had received permission from appellant, her employer, to go. However, appellant changed his mind in June and would not let Paula leave. Campbell spoke to appellant about this, and appellant told her, "Well, if you all will just wait until late August [to go], I will pay for everything."

Don Janowski, another acquaintance of appellant's, testified that in February of 1976, appellant approached him and inquired about finding a "hit man." Janowski testified that he believed appellant said that he was going to "hit" two people.

We hold that the evidence is sufficient to show that appellant committed murder "for remuneration or the promise of remuneration" as alleged in the indictment. See V.T.C.A. Penal Code, Section 19.03(a)(3). The conduct proscribed by this section of the capital murder statute is the killing of any person in order to receive, or for the purpose of receiving some benefit or compensation. Thus, the focus of the criminal culpability is upon the actor's state of mind.

The record clearly reflects that appellant *expected* to share in the proceeds from the estate of the victims and that he acted out of an expectation that he would receive such remuneration. He made payments totaling $12,000 to hire a professional killer; he made statements to others that he was to receive a share of the victims' estate upon their deaths, and he indicated to two people that he expected to "come into" some money in August.

Further, appellant could have inferred from Paula's conduct that she agreed to and acquiesced in his request for one-third of the proceeds of the estate. Paula knew that appellant was serious about having her parents murdered, and, according to her own testimony, she listened to appellant discuss these plans frequently. She discussed her parents' financial status with appellant, and gave him information concerning their activities, including their whereabouts at certain times. The record is clear that appellant perceived Paula's conduct as an implicit promise of a benefit and that he acted upon that basis.

Upon review by this Court, the evidence must be viewed in the light most favorable to the jury's verdict. *Jones v. State*, 582 S.W.2d 129 (Tex.Cr.App.1979); *Seaton v. State*, 564 S.W.2d 721 (Tex.Cr.App.1978); *Rogers v. State*, 550 S.W.2d 78 (Tex.Cr.App. 1977); *Clark v. State*, 543 S.W.2d 125 (Tex. Cr.App.1976). We find that the evidence is sufficient to support the jury's finding that appellant committed the murders for remuneration or the anticipation thereof.

Appellant further contends that the evidence is insufficient to sustain the conviction because there is no corroboration of the accomplice witness' testimony. The jury was charged that Paula Derese was an accomplice witness as a matter of law. On the basis of Ben Tabor's testimony that he had led appellant to believe that he had procured a "hit man" for appellant, but that he in fact had not done so, but rather had told appellant this to "con" him out of money, the jury was charged that they could find Tabor an accomplice witness as a matter of fact.

Article 38.14, Vernon's Ann.C.C.P. provides:

"A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."

In *Carrillo v. State*, 566 S.W.2d 902 (Tex. Cr.App.1978), we reiterated that:

"[t]he test as to the sufficiency of the corroboration [of the accomplice witness' testimony] is to eliminate from consideration the evidence of the accomplice witness and then to examine the evidence of other witnesses with the view to ascertain if there be inculpatory evidence, that is evidence of incriminating character which tends to connect the defendant with the commission of the offense. If there is such evidence, the corroboration is sufficient; otherwise, it is not."

[2, 3] See also *Bentley v. State*, 520 S.W.2d 390 (Tex.Cr.App.1975); *Edwards v. State*, 427 S.W.2d 629 (Tex.Cr.App.1968). Further, the mere showing that an offense occurred is not sufficient corroboration. *Carrillo v. State*, supra; *Windham v. State*, 479 S.W.2d 319 (Tex.Cr.App.1972). It is not necessary that the corroboration directly link the accused to the crime or be sufficient in itself to establish guilt, *Carrillo v.*

*State*, supra; *Attwood v. State*, 509 S.W.2d 342 (Tex.Cr.App.1974); it need only make the accomplice witness' testimony more likely than not. *Carrillo v. State*, supra; *Warren v. State*, 514 S.W.2d 458 (Tex.Cr. App.1974).

[4] Even if we assume that Tabor, as well as Paula, was an accomplice witness, appellant's contention is without merit. The record reflects that two witnesses testified that appellant indicated to them that he expected to be "coming into" some money in August, the month after the murders. Don Janowski testified that in February 1976, appellant approached him and inquired about finding a "hit man" and indicated that he wanted two people killed. There was testimony that appellant rented a white Monte Carlo from the Houston airport on the afternoon before the murders and returned it the next morning. Two other witnesses, Ken Giles and Reid Hughes, both testified that they saw a car matching that description around the deceased's neighborhood and house the afternoon of the murders. Further, Hughes identified appellant as the driver of that car. The record further reflects that appellant altered his physical appearance the day after the murders, and then fled the jurisdiction immediately prior to his trial setting. We hold that this other inculpatory evidence tends to connect appellant with the commission of the offense and makes the accomplice testimony more probable than not. Thus, the testimony is sufficiently corroborated. See *Carrillo v. State*, supra; *Bentley v. State*, supra; *Warren v. State*, supra. Appellant's challenges to the sufficiency of the evidence to sustain the conviction are overruled.

In his first ground of error, appellant contends that:

"[t]he Trial Court erred in overruling Appellant's motion to quash the indictment in that it failed to apprise the Appellant as to the capacities in which he was alleged to have committed capital murder, to wit; whether he promised someone remuneration and whom did he promise or was he promised remuneration and by whom."

Appellant filed his motion to quash the indictment on March 7, 1977. A hearing was held on that date, after which the trial court overruled the motion.

V.T.C.A. Penal Code, Sec. 19.03 provides that:

"(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

* * * * * * *

"(3) *the person commits the murder for remuneration or the promise of remuneration* or employs another to commit the murder for remuneration or the promise of remuneration." (Emphasis added)

The indictment charging appellant with capital murder alleged in part that appellant:

". . . did then and there unlawfully, intentionally and knowingly, acting as a party with Paula Cantrell Derese and other persons to the Grand Jury unknown, cause the death of Paul Harvey Cantrell by choking and strangling him with a cord and cutting him with a knife; and said murder was committed for remuneration and the promise of remuneration, namely, money from the proceeds of life insurance and the estate of Paul Harvey Cantrell and Mary Bright Cantrell."

Article 21.02, Vernon's Ann.C.C.P. provides that in an indictment, the offense must be set forth in plain and intelligible words. Further, an indictment "shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged." Article 21.11, Vernon's Ann.C. C.P.

[5] Appellant now contends that the indictment failed to apprise him of the charge against him with such particularity as to enable him to prepare his defense. This

contention was raised prior to trial, and therefore the fundamental constitutional protections of adequate notice and due process are involved. *Haecker v. State*, 571 S.W.2d 920 (Tex.Cr.App.1978); *Drumm v. State*, 560 S.W.2d 944 (Tex.Cr.App.1977). These fundamental protections require careful examination and consideration from the perspective of the accused. *Haecker v. State*, supra.

[6] An indictment must allege *facts* sufficient to give the accused notice of the particular offense with which he is charged. Article 21.11, supra. As we stated in *Haecker v. State*, supra:

"[i]t is not sufficient to say that the accused knew with what offense he was charged; rather, we must inquire as to whether the face of the instrument sets forth in plain and intelligible language sufficient information to enable the accused to prepare his defense. *Moore v. State*, 532 S.W.2d 333 (Tex.Cr.App.1976)."

[7] In the instant case, the indictment clearly alleges that appellant did *cause* the death of Paul Cantrell, by choking and strangling him with a cord and cutting him with a knife, and that this murder was committed for remuneration and the promise thereof, which was to be the proceeds from the life insurance and estate of the deceased. Thus, the indictment clearly sets out the acts committed by appellant constituting the offense. The indictment is *not* susceptible to the interpretation, as appellant alleges, that appellant *employed* another to do the killing or that he promised *another* person compensation for doing it; it clearly alleges that *appellant* committed the murder and that *he* was *promised* compensation by another to do it.

[8] Thus, the issue presented to this Court is whether the indictment failed to allege *who* promised appellant such remuneration for committing the murder, and whether this denied appellant adequate notice of the charge against him. We hold that there was no such failure to give appellant notice.

The indictment alleged that appellant committed the murder, "acting as a party with Paula Cantrell Derese and other persons to the Grand Jury unknown," and that such murder was committed for remuneration. The clear import of this language is that the remuneration or the promise of remuneration was to be supplied by this named party to the offense or by a person or persons unknown. While no model, the indictment, when read as a whole, does, indeed, give appellant sufficient notice of who promised him or was to supply him the remuneration. While there is some evidence in this case that appellant attempted to and perhaps succeeded in hiring someone to do the killings with him, this is not the offense for which appellant was indicted and prosecuted. The gravamen of the capital murder offense charged in this indictment, of which appellant was given notice, was his having been promised compensation by Paula to kill the victims and on that basis, having killed them. Since the indictment sufficiently alleges facts to enable appellant to prepare his defense, the indictment was not subject to a motion to quash on this ground.

Appellant's reliance upon *Hobbs v. State*, 548 S.W.2d 884 (Tex.Cr.App.1977) is misplaced. Therein, we held that the indictment for *attempted* capital murder was fundamentally defective for the failure to allege, as is necessary in charging an attempted offense, that acts were done "amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." V.T.C.A. Penal Code, Section 15.01(a). Thus, the basis of that holding was the failure of the indictment to allege an *element* of the *offense*. This holding is completely inapplicable to the instant case. Appellant's first ground of error is overruled.

In his second ground of error, appellant contends that the trial court erred in failing to grant his motion for a change of venue as a matter of law since his motion was uncontroverted by the State prior to jury selection.

[9, 10] Article 31.03, Vernon's Ann.C.C.P., provides that a defendant in a criminal case may file in the trial court a motion for a change of venue, supported by affidavits. Article 31.04, Vernon's Ann.C.C.P., allows the State to file controverting affidavits. The filing of such controverting affidavits raises an issue of *fact* to be tried and resolved by the trial court; thus, the trial court must then make a determination of this issue on its merits. Such decision on the merits is within the discretion of the court, and will only be reversed by this Court upon a showing that the trial court abused its discretion. *Freeman v. State*, 556 S.W.2d 287 (Tex.Cr.App.1977); *Adami v. State*, 524 S.W.2d 693 (Tex.Cr.App.1975).

[11] However, if no controverting affidavit is filed by the State, the defendant is entitled to a change of venue *as a matter of law*. *Stapleton v. State*, 565 S.W.2d 532 (Tex.Cr.App.1978); *Durrough v. State*, 562 S.W.2d 488 (Tex.Cr.App.1978). The reason that the defendant is entitled to this change as a matter of law is because in the absence of controverting evidence, there is no issue of *fact* to be resolved. When there is no issue of fact to be determined by the trial court, and no place for its exercise of discretion, it must grant the defendant's motion. *Durrough v. State*, supra. This is the reason it is stated that in this situation, a defendant is entitled to such change as a matter of law.

[12] However, it is clear that a defendant may *waive* his *per se* right to a change of venue. If the State has filed no controverting affidavit, and the defendant proceeds to a hearing without objecting that there is no issue of fact to be tried and that he is thus entitled to the change as a matter of law, he waives his right to the *per se* change of venue. *Puryear v. State*, 510 S.W.2d 356 (Tex.Cr.App.1974); *Lewis v. State*, 505 S.W.2d 603 (Tex.Cr.App.1974); see also *Von Byrd v. State*, 569 S.W.2d 883 (Tex.Cr.App.1978) (footnote #9). Where the defendant, without such objection, allows the trial court to hear the merits of the issue and to thus exercise its discretion in determining the issue of fact, he cannot thereafter argue that no issue of fact was raised and that he was entitled to the change as a matter of law.

[13] In the instant case, the record reflects that appellant filed his motion for a change of venue on February 28, 1977, in compliance with Article 31.03, supra. The State did not file a controverting affidavit at this time. On March 7, 1977, at a pre-trial hearing, appellant again requested a *hearing* on the motion. The trial court stated that it would not rule on the motion prior to the selection of the jury. On that same date, after the voir dire examination had begun, appellant again requested a *hearing* on the motion, which the trial court denied. Two days later, the record reflects that appellant understood and *acquiesced* in the court's postponing the venue issue until after the voir dire was completed.[1]

1. The record reflects that on March 9, 1977, during the voir dire examination, the following exchange occurred concerning the extent to which defense counsel was entitled to delve into pre-trial publicity with prospective jurors:

"MR. VELA: Your Honor, we are also pursuing this matter in light of a motion for change of venue, so it is not just for cause. We have urged this motion upon the Court. We need to be able to inquire as to the extent of the publicity, the extent of any prejudice, the extent of any discussions. And to restrict us, once again, would deny us two things. One, the determination of their qualifications to sit as jurors and, number two, and more importantly, or just as important, determination as to whether or not a change of venue is in order in this Court. We cannot make either one of those determinations without inquiry.

THE COURT: Counsel, we are right now trying to select a jury.

MR. VELA: I understand.

THE COURT: Now, if we select a jury and you want to hear your motion on a change of venue, we will hear it. I am not precluding you from your motion nor am I combining the jury selection and a motion for a change of venue.

MR. VELA: My understanding was that the Court was carrying it along and was going to wait—

THE COURT: Carrying it along, yes.

MR. VELA: And was going to wait and see—

THE COURT: This is not a motion hearing. This is for selection of the jury. If at the

On April 18, 1977, after the voir dire examination was completed, appellant again mentioned to the court the requested hearing on the motion. The next day, the State filed its controverting affidavit. On that date, a hearing was held on appellant's motion and evidence was received by the court, after which the motion was overruled. The record nowhere reflects that appellant objected to the hearing on the ground that, since his motion had theretofore been uncontroverted, there was no issue of fact to be tried, and that he was thus entitled to the change of venue as a matter of law. Further, the record does not reflect that appellant, after filing the motion, ever requested more than a *hearing*. He never urged the court to *grant* his motion as a matter of law; instead, he persisted in his request for a *hearing* on the motion.

Therefore, the issue is whether, by his failure to request the change as a matter of law and his failure to object to the trial court's holding the hearing, appellant waived his right to the change of venue as a matter of law. Under the authority of *Puryear v. State*, supra, *Lewis v. State*, supra, and *Von Byrd v. State*, supra, we hold that appellant did waive this right. This ground of error is overruled.

Appellant next contends that the trial court abused its discretion in denying this motion for a change of venue after he presented "overwhelming evidence that appellant could not obtain a fair and impartial trial in Harris County . . ."

On April 19, 1977, after a jury was selected, appellant was granted a hearing on his motion for a change of venue. Much evidence was presented from local newspapers and television stations regarding their coverage and publicity of this case. Numerous lawyers and a few judges testified on appellant's behalf, and stated that appellant could not get a fair and impartial trial in Harris County. Testimony was also presented that appellant could not get a fair and impartial trial because of the publicity surrounding Paula's confessions, and additional detailed reports on the case. On rebuttal, the State presented testimony from witnesses that the pre-trial publicity was not excessive and that appellant could get a fair and impartial trial in Harris County.

[14] We are cognizant that the question of whether a change of venue should be granted because of prejudicial publicity is one of constitutional dimension and that the test to be applied by the court is whether outside influences affecting the community's climate of opinion as to a defendant are so inherently suspect that the resulting probability of unfairness requires suitable procedural safeguards. See *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); see also, *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962).

[15] An examination of the exhibits introduced at the hearing indicates that all of the information contained in the news reports was accurate and was apparently

> conclusion, either way, you know, if we are able to conclude by selecting a jury, you want your motion heard, it will be heard in full.
>
> MR. VELA: I am not arguing with the Court. I want the record to reflect exactly what our agreement was so I will have it straight in my mind. My understanding of the agreement—
>
> THE COURT: First of all, I didn't know it was an agreement.
>
> MR. VELA: I am sorry, I misused the word. The order of the Court. I want to make sure I understand and the record reflects the order of the Court relative to the motion. My understanding was that the Court would see how the selection process progressed.
>
> THE COURT: That is correct. Under the law of selecting a jury and not under any motion for change of venue.
>
> MR. VELA: I understand. And then, in order to allow me to complete my sentence, that at the end of some period of time—I believe the Court instructed us that possibly a week—the Court would then determine whether or not, on its own motion, would grant a change of venue."

placed there for the purpose of informing the public of current events. *Bell v. State*, 582 S.W.2d 800 (Tex.Cr.App.1979); *Adami v. State*, 524 S.W.2d 693 (Tex.Cr.App.1975); *Morris v. State*, 488 S.W.2d 768 (Tex.Cr. App.1973); *Taylor v. State*, 420 S.W.2d 601 (Tex.Cr.App.1967). Further, testimony that appellant could not receive a fair and impartial trial in Harris County was contradicted by testimony presented by the State.

In the instant case, the trial court was presented with conflicting testimony with respect to whether appellant could obtain a fair trial in the local community because of pre-trial publicity. This issue was decided adversely to appellant's contentions when the trial judge, as the trier of facts, overruled the motion for change of venue. *Bell v. State*, supra; *Von Byrd v. State*, 569 S.W.2d 883 (Tex.Cr.App.1978); *Freeman v. State*, 556 S.W.2d 287 (Tex.Cr.App.1977); *Ransonnette v. State*, 522 S.W.2d 509 (Tex. Cr.App.1975). We hold that the trial court did not abuse its discretion in overruling appellant's motion.

[16] After overruling appellant's motion, the court set the trial for April 25, 1977. On this date, appellant failed to appear and his bond was forfeited. Evidence showed that appellant fled the jurisdiction. After he was captured in Florida, and returned to Houston, counsel for appellant reurged his motion for a change of venue. On May 9, 1977, the trial court held another hearing. Appellant introduced into evidence newspaper reports from April 25 to May 7, concerning appellant's flight and apprehension. The parties stipulated that there was coverage of these events carried on radio and television. George Flynn, who previously testified that appellant could get a fair trial in Harris County, testified that since the subsequent publicity of appellant's flight, he thought that it would be difficult for appellant to receive a fair trial there. George Pthick, a radio broadcaster, testified that he had interviewed one of the prosecutors in the case, who had stated that he thought the trial judge would have to move the trial out of Houston. The parties also stipulated that the witnesses who testified at the previous hearing on the motion for change of venue would testify to the same matters now as they had at that previous hearing. This included the testimony that appellant *could* receive a fair trial in Harris County. Thus, the record does not reflect that the trial court abused its discretion in overruling the motion for a change of venue which was reurged prior to trial. See *Bell v. State*, supra; *Adami v. State*, supra; *Morris v. State*, supra. This ground of error is overruled.

[17] In two grounds of error, appellant complains of the trial court's imposing limitations on his voir dire examination of two prospective jurors. Particularly, he complains that he was not allowed to freely examine veniremen Benny Ballard and William Achgill concerning any "bias or prejudice resulting from pre-trial publicity." We hold that appellant has failed to preserve error by failing to propound to the trial court specific questions which he claims he was denied the opportunity to ask the two prospective jurors. Further, even if error had been preserved, the record reflects that the trial court's limitation of the voir dire examination was not unreasonable and did not constitute an abuse of discretion.

We point out, as a preliminary matter, that the transcription of the voir dire examination alone in the instant case consisted of more than *five thousand three hundred legal size pages*. Discussions of the trial court's ruling on the limitation of the voir dire examination ran throughout the proceedings. Appellant only directs our attention to certain portions of these discussions; thus, it has been necessary for us to independently examine much of the record in order to ascertain the exact nature of the court's rulings and appellant's particular objections thereto.

The record reflects that during the voir dire examination, the trial court adopted a procedure whereby it would first question each prospective juror about his or her attitude toward the death penalty and inquire about the pre-trial publicity with which each was familiar and its effect upon the prospective juror, in order to determine

whether a bias against appellant existed. After the examination of several jurors by both parties, the State objected to the defense informing the venirepersons that Paula Derese had pled guilty to the murders of her parents. The basis of this objection was that to so inform prospective jurors, who held no conclusion or opinion as to appellant's guilt, might tend to prejudice them against appellant, which would then allow the defense to challenge them for being biased. The defense contended that they were entitled under Article 35.16, Vernon's Ann.C.C.P. to continue the inquiry concerning pre-trial publicity. Towards the end of the discussion, the State clearly delineated that its objection was only to the defense informing the jurors of the content of the pre-trial publicity in the course of examining them. The trial court did not rule at this time.

After examinations of a few more venirepersons, the defense asked for a clarification on this issue. The court stated that if, after its examination, the juror stated that he or she had no conclusion as to appellant's guilt, then it would limit the inquiries as to pre-trial publicity. Appellant objected to the court's ruling in that it denied him the opportunity to determine whether the prospective juror would be impartial. The next time the issue arose, the court restated that where any prospective juror indicated that he or she had formed any conclusion as to appellant's guilt, then the defense could delve into the pre-trial publicity in depth. However, where the venireperson indicated that he or she had formed no conclusion, then the defense would not be permitted to do so.

The trial court first examined venireman Benny Ballard and determined that he had no opinion or conclusion from the pre-trial publicity as to appellant's guilt. After the State had examined Ballard, the defense again objected to the trial court's ruling "prohibiting [them] from, and again, going into the extent of the publicity and any bias or prejudice it may have had on this venireman." This was overruled. After examining Ballard, the defense exercised a peremptory challenge to strike him from the panel. The record later reflects that after examining venireman William Achgill, the defense accepted him as a juror without any objection.

A discussion of the court's ruling took place again after appellant exhausted his peremptory challenges. The defense again stated its objection to the limitation with regard to another prospective juror. The State responded:

"[PROSECUTOR]: . . . there has been no attempt by Mr. Vela [defense counsel] to explore that area, and that he was not denied exploring that area.

"THE COURT: I agree.

* * * * * *

"[DEFENSE COUNSEL] I would like to inquire as to the Court's ruling on whether or not we can inquire into pre-trial publicity.

"THE COURT: *Counsel, I have never precluded you from going into pre-trial publicity except the manner in which you went into it at the first, that is, to take every news item and bring it up to the juror.*

* * * * * *

"[DEFENSE COUNSEL] . . . we have always been prevented from going into publicity after the venireman has been turned over to us by the State.

"THE COURT: That is not true.

"[DEFENSE COUNSEL] . . . [W]hen we have felt it so necessary to, we have felt that we have done it at our peril and could possibly be held in contempt of Court and this Court's ruling. That has been our position all along.

"THE COURT: Counsel, you did in fact go into it on at least one juror after my ruling. No one objected. The Court did not object. You were not held in contempt. In fact, no comment was ever made about it . . . ."

We hold that appellant has failed to preserve error as to these two grounds. In both cases, appellant failed to propound to the trial court or to let the record reflect what questions concerning pre-trial publici-

ty he complains he was not allowed to ask. In *Graham v. State*, 566 S.W.2d 941 (Tex.Cr.App.1978), we stated, "[a]lthough it is not necessary to show the *answer* that would be given in order to preserve error if a question for exercising peremptory challenges is disallowed, *Burkett v. State*, 516 S.W.2d 147 (Tex.Cr.App.1974), the *question* should certainly appear in the record." See also *Rose v. State*, 470 S.W.2d 198 (Tex.Cr.App.1971); *Longs v. State*, 429 S.W.2d 157 (Tex.Cr.App.1968).

The reason for such a rule is readily apparent in the instant case. In such a lengthy voir dire examination, as here, where the trial court has discretion to impose reasonable limits on the conduct thereof, some questions proposed by the parties regarding the pre-trial publicity might be proper and some would not be. In order for this Court to determine whether the parties' questions were proper questions, they must appear in the record. In the instant case, certainly the trial court did not err in refusing to allow the defense to tell a prospective juror of all the facts which were the subject of the publicity, and then to object that he or she had formed a conclusion as to appellant's guilt. The record simply does not reflect what other questions the defense wanted to ask. Without such a showing, we cannot hold that the trial court erred in disallowing certain inquiries into pre-trial publicity of this case.

Further, even if error had been preserved, it is apparent that the trial court did not abuse its discretion in imposing some limitation on the conduct of the voir dire examination.

[18] We recognize that the right to be represented by counsel, guaranteed by the Sixth Amendment and Article 1, Section 10 of the Texas Constitution, encompasses the right of counsel to question the members of the jury panel in order to intelligently exercise his peremptory challenges. *Mathis v. State*, 576 S.W.2d 835 (Tex.Cr.App.1979); *Florio v. State*, 568 S.W.2d 132 (Tex.Cr.App. 1978); *Abron v. State*, 523 S.W.2d 405 (Tex. Cr.App.1975); *Smith v. State*, 513 S.W.2d 823 (Tex.Cr.App.1974). However, the trial court, within its sound discretion, can and should control the voir dire examination of the venire.

[19, 20] We reiterate that the trial court may impose reasonable restrictions on the exercise of voir dire examination. *Bodde v. State*, 568 S.W.2d 344 (Tex.Cr.App.1978); see *Emanus v. State*, 526 S.W.2d 806 (Tex. Cr.App.1975); *Smith v. State*, 513 S.W.2d 823 (Tex.Cr.App.1974); *Lewis v. State*, 488 S.W.2d 740 (Tex.Cr.App.1972); *McCarter v. State*, 478 S.W.2d 524 (Tex.Cr.App.1972). Duplicitous questions may, within the court's discretion, be limited to curb the prolixity of what can become the lengthiest part of a criminal proceeding. *Bodde v. State*, supra. In the instant case, the transcription of the voir dire examination was especially lengthy. The issue thus presented in such a situation is whether the trial court abused its discretion in the limitations which were imposed on voir dire examination.

In the instant case, the record reflects that the trial court did not err in limiting appellant's voir dire examination of prospective juror Ballard. See Appendix A. Herein, the trial court questioned Ballard concerning the extent of pretrial publicity with which he was familiar. Further inquiry was made concerning whether the juror had formed any opinion or conclusion of appellant's guilt. Thus, the trial court did not abuse its discretion in prohibiting the defense from again questioning the venireman about pre-trial publicity. *Freeman v. State*, 556 S.W.2d 287 (Tex.Cr.App.1977).

[21] Neither did the court abuse its discretion in limiting appellant's examination of prospective juror Achgill. See Appendix B. Again, the trial court examined this prospective juror at length concerning the pre-trial publicity with which he was familiar. The court carefully inquired whether Achgill had formed any conclusion as to appellant's guilt or innocence. No abuse of discretion is shown in the court's limitation of duplicitous questioning. *Freeman v. State*, supra.

[22] Appellant also contends that the trial court's limitation of his voir dire examination was in violation of Article 35.16, Vernon's Ann.C.C.P. This statute provides, in part:

"Reasons for Challenge for Cause

"(a) A challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury. A challenge for cause may be made by either the state or the defense for any one of the following reasons:

. . . . . .

9. That from hearsay, or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged without further interrogation by either party or the court. If he answers in the negative, he shall be further examined as to how his conclusion was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case . . ."

This statute deals with the disqualification of prospective jurors and challenges for cause. The procedure used to determine whether a juror is disqualified applies *only* when a prospective juror states that he or she *has* formed a conclusion as to the guilt or innocence of the defendant. If the juror states that he or she has formed no such conclusion, then, of course, there *is no reason to ask* whether the "conclusion so established" will influence the verdict. Thus, this statute does not, as appellant contends, give the defense absolute statutory authority to examine the jurors about each bit of information recounted in the media.

The record reflects that each of the two veniremen was qualified by the trial court under this statute. No error is shown. Grounds of error four and five are overruled.

[23] In his sixth and seventh grounds of error, appellant contends that the trial court erred in granting a challenge for cause after a juror had been sworn and impaneled.

On Friday, March 11, 1977, venireperson Richard Blanchard was examined by the court, the State and the defense, and was selected as the second juror in this case. He was sworn and impaneled. On the following Monday morning, the court notified the parties that Blanchard had contacted the trial judge that morning, indicating that he had some reservations concerning his service on the jury.

After examining the juror concerning his reservations about the death penalty and his ability to serve on a capital jury, the court granted the State's challenge for cause under V.T.C.A. Penal Code, Section 12.31(b), and excused the juror from service. Appellant now contends that the court erred in excusing this juror after he was impaneled and sworn, and in refusing to grant his motion for a mistrial.[2]

2. We note that appellant did not at trial, nor does he now, object to the court's excusing Blanchard under the authority of Section 12.31(b), supra. Further, he does not complain that the juror was excused in violation of *Witherspoon v. Illinois*, nor did he request any opportunity to determine whether the juror was still qualified under *Witherspoon*, nor is there any showing in the record that the juror was qualified under *Witherspoon*. His sole objection at trial and on appeal is the fact that a juror was excused after having been impaneled and sworn, and that a juror has an "absolute right" to change his opinions after being selected.

We hold that the trial court did not abuse its discretion in granting the State's challenge for cause. Blanchard testified that he was not sure whether he could give the case fair and impartial consideration and that the mandatory penalty would affect his factual deliberations. The trial court determined that Blanchard was disqualified from serving, and appellant did not request to show otherwise. See *Pittman v. State*, 434 S.W.2d 352 (Tex.Cr.App.1968) (on Motion for Rehearing). We are unable to determine how appellant was harmed by the court's action. Blanchard was the second juror selected, and he was excused before any other venirepersons were examined. He heard no evidence in the case, and he was instructed by the court when he was selected not to discuss the case. We are also unable to discern how appellant was harmed by the court's failure to discharge [illegible] other juror who had already been selected. See *Boddie v. State*, 568 S.W.2d 344 (Tex.Cr.App.1978) and cases cited therein; cf. *Henriksen v. State*, 500 S.W.2d 491 (Tex.Cr.App.1973). These grounds of error are overruled.

[24] In a related ground of error, appellant complains of the trial court's refusal to allow him to perfect a bill of exception as to the reasons why juror Blanchard had a "change of heart" with regard to the death penalty. *After* the trial court granted the State's challenge for cause to Blanchard, appellant requested to examine him about his change in position, which the trial court denied. Appellant then perfected a bill of exception as to the questions he wanted to ask Blanchard. The bill reflects that appellant wanted to ask Blanchard (1) whether he had given false answers on Friday before he was selected or whether he had changed his mind about his position on the death penalty over the weekend; and (2) what brought about his change in position on the death penalty.

We hold that the trial court did not err in disallowing this inquiry. First, the testimony of Blanchard does contain information about why he approached the trial court with his reservations about the death penalty. The gist of his testimony is that after having been selected to sit in a capital case, he gave much thought to his previous position on capital punishment, and no longer felt sure that he believed in capital punishment. Second, to refuse to allow appellant to delve into the mental processes of the juror about why he had changed his mind did not constitute an abuse of discretion by the trial court, once it became apparent that the juror was disqualified under the statute and that appellant did not object on that basis or request an opportunity to show that he was still a qualified juror. This ground of error is overruled.

[25, 26] In his ninth ground of error, appellant contends that the trial court erred in not fully and adequately inquiring into the effects on the jurors of appellant's flight from the jurisdiction. The record reflects that after a jury was selected, but before trial on the merits began, appellant forfeited his bond and left the jurisdiction. Shortly thereafter, he was apprehended in Florida and was returned.

Before proceeding with the trial, the court, at appellant's request, polled the jury individually to determine the effect, if any, of this publicity. Each juror individually stated that he or she had formed no conclusion as to appellant's guilt or innocence, and stated that he or she would base his or her verdict entirely upon the evidence and the law given in the courtroom.

After the entire questioning was finished, appellant objected "on the grounds that the questioning has not been in compliance with Article 35.16 and the true determination of any pre-trial publicity has not been made." This objection was overruled.

We hold that no error has been shown. Appellant had requested the court to poll the jury; this the court did. Appellant received exactly what he had requested; he never requested an opportunity to question the jurors himself, nor did he propose specific questions to the trial court to be asked of the jurors. His objection, *which came too late and was* [illegible] cient to preserve [illegible] have had. Further [illegible] were sufficient to [illegible] lant's rights. See [illegible] S.W.2d 145 (Tex.C[illegible] *v. State*, 159 Tex.C[illegible] (1953). This groun[illegible]

[27] Appellant [illegible] trial court erred wh[illegible] to impeach Reid H[illegible] witness, with a con[illegible] had helped prepar[illegible] Reid Hughes testif[illegible] the street from the[illegible] of the murders, he [illegible] white Monte Carl[illegible] neighborhood. He [illegible] of the car.

On the night of [illegible] bodies of the dec[illegible] Hughes related wha[illegible] officers. Based u[illegible] composite picture w[illegible] morning hours. Se[illegible] identified appellant [illegible] the driver of the ca[illegible]

At trial, appella[illegible] into evidence the c[illegible] pared shortly after [illegible] covered, in order to [illegible] fication of appellant[illegible] ed to allow this co[illegible] introduced, ruling th[illegible] We agree.

Hughes consisten[illegible] composite picture w[illegible] the night of the mu[illegible] accurately represent[illegible] driving the car. He [illegible] "wasn't close at all." [illegible] not close to the [illegible] "couldn't put it all t[illegible] drawing." Thus, t[illegible] show a prior inconsi[illegible] the witness.

Since the witness [illegible] posite picture was n[illegible] bling the person he [illegible] the car, it was immat[illegible]

*too late and was too general*, was insufficient to preserve any complaint he might have had. Further, the trial court's actions were sufficient to adequately protect appellant's rights. See *Brown v. State*, 516 S.W.2d 145 (Tex.Cr.App.1974); *Klinedinst v. State*, 159 Tex.Cr.R. 510, 265 S.W.2d 593 (1953). This ground of error is overruled.

[27] Appellant next contends that the trial court erred when it denied his request to impeach Reid Hughes, an identification witness, with a composite picture which he had helped prepare previously. At trial, Reid Hughes testified that he lived down the street from the Cantrells. On the day of the murders, he observed two men in a white Monte Carlo driving around his neighborhood. He had observed the driver of the car.

On the night of the murders, after the bodies of the deceased were discovered, Hughes related what he had seen to police officers. Based upon his descriptions, a composite picture was prepared in the early morning hours. Some ten days later, he identified appellant from another picture as the driver of the car.

At trial, appellant sought to introduce into evidence the composite drawing prepared shortly after the murders were discovered, in order to impeach Hughes' identification of appellant. The trial court refused to allow this composite drawing to be introduced, ruling that it was "immaterial." We agree.

Hughes consistently testified that the composite picture which he helped prepare the night of the murders did *not* fairly and accurately represent the person he had seen driving the car. He further testified that it "wasn't close at all." The composite "was not close to the man [he] saw." He "couldn't put it all together for a composite drawing." Thus, the composite did not show a *prior* inconsistent identification by the witness.

Since the witness testified that the composite picture was not even close to resembling the person he had observed driving the car, it was immaterial and not probative of his pre-trial identification. Thus, the trial court did not err in refusing to allow the defense to introduce the composite into evidence to impeach Hughes. See, *Sherbert v. State*, 531 S.W.2d 636 (Tex.Cr.App.1976); *Hoffman v. State*, 514 S.W.2d 248 (Tex.Cr.App.1974); *Harrison v. State*, 495 S.W.2d 930 (Tex.Cr.App.1973). This ground of error is overruled.

In his eleventh ground of error, appellant contends that the trial court erred in overruling his request for the grand jury testimony of State's witness Ben Tabor. During the cross-examination of Tabor, the witness stated that he had reviewed his grand jury testimony before testifying at trial. The trial court reviewed the witness' grand jury testimony and ruled that appellant was not entitled to use it to cross-examine Tabor. The trial judge sealed the grand jury testimony and made it a part of the appellate record for this Court's inspection.

[28, 29] The production of grand jury testimony lies within the sound discretion of the trial court and the accused may be permitted to inspect such testimony where "some special reason" exists or where a "particularized need" is shown so as to outweigh the traditional policy of grand jury secrecy. *Martin v. State*, 577 S.W.2d 490 (Tex.Cr.App.1979); *Mott v. State*, 543 S.W.2d 623 (Tex.Cr.App.1976). *Nelson v. State*, 511 S.W.2d 18 (Tex.Cr.App.1974); *Brown v. State*, 475 S.W.2d 938 (Tex.Cr. App.1971).

In the instant case, we cannot conclude that appellant has shown a "particularized need" for the grand jury testimony so as to reflect that the trial court abused its discretion in refusing to order its production. See *Mott v. State*, supra; *Brown v. State*, supra; *Martinez v. State*, 507 S.W.2d 223 (Tex.Cr.App.1974).

Further, we have examined the sealed testimony, and conclude that such testimony was entirely consistent with the witness' testimony at trial. Thus, we fail to see how appellant was harmed by the trial court's refusing to make such testimony available for cross-examination. *Mott v. State*, supra; *Brown v. State*, supra; see also *Hoff-*

...v. State, 514 S.W.2d 248 (Tex.Cr.App. 1974); Garcia v. State, 454 S.W.2d 400 (Tex. Cr.App.1970). This ground of error is overruled.

[30] In his twelfth ground of error appellant contends that the trial court denied him his Sixth Amendment right to confrontation in refusing to allow him to cross-examine Paula Derese concerning two letters she had written.

In cross-examining Paula, the defense produced a steno pad, identified as Paula's, which contained two letters which she had written. After a hearing out of the presence of the jury, the trial court refused to allow the defense to impeach her testimony with these letters, sustaining the State's objection that the letters were immaterial. We agree that the letters were immaterial.

Several times, Paula testified that she was in love with her estranged husband, Herbie, and that she desired to reconcile with him, which was a source of conflict between her and her parents. She also denied that she had ever participated in a conversation with anyone about a murder made to look like an accidental death.

[31] The first letter, with which appellant sought to impeach Paula, was written by Paula to Herbie, but was never mailed. In this letter, she expressed her intention to leave Herbie and her anger towards him. In the hearing out of the jury's presence, it was developed that this letter was written several years ago, when Paula and Herbie separated for one day. We hold that the trial court's ruling was correct; this old letter did not impeach her testimony that during the months before her parents were murdered, she desired to reconcile with Herbie. Thus, it was not probative of her credibility in this case, as appellant contends, and the trial court properly excluded it. It is well settled that a witness may not be impeached on immaterial and collateral matters. See *Williams v. State*, 542 S.W.2d 131 (Tex.Cr.App.1976); *Ellard v. State*, 507 S.W.2d 198 (Tex.Cr.App.1974); *Fisbeck v. State*, 166 Tex.Cr.R. 105, 311 S.W.2d 865 (1958).

[32] The second letter in the steno pad was written by Paula to a previous boyfriend, Clay. In that letter, Paula made references, which she explained, to the fact that two of Herbie's relatives had been involved in a murder in Port Arthur in 1973. There was also a reference, Paula explained, to the fact that one of the perpetrator's wives turned them in, and an implication that the wife might be involved in some accident thereafter. Appellant sought to impeach her with this letter as being inconsistent with her testimony at trial that she never had knowledge of any murder that was made to look like an accidental death.

We hold that the trial court did not err in excluding this evidence. Paula testified at the hearing on this matter that she did not know when she wrote that letter. The testimony indicates it was written sometime between 1973 to 1975. Further, Paula testified that she was just recounting matters that Herbie had told her. Again, we do not find that this letter was material or probative as to any issue in the case; since a witness may not be impeached on immaterial and collateral matters, no error is shown. See *Williams v. State*, supra; *Ellard v. State*, supra; *Fisbeck v. State*, supra.

[33] In a related ground of error, appellant contends that the trial court erred in not allowing him an opportunity to question Paula about the letters in the steno pad for the purposes of perfecting his bill of exception. The record reflects that this contention is without merit.

First, appellant, in a hearing out of the presence of the jury, was given ample opportunity to question Paula about the letters. Further, the record reflects that he did examine her about the contents of each. Still further, the questions which appellant proposed in his bill of exception were answered by Paula during the hearing out of the jury's presence. Also, the record nowhere reflects that appellant requested to examine her further or that his examination of her was in any way limited by the trial court.

[34] In his fourteenth ground of error, appellant contends that the trial court erred in refusing to permit him to impeach Paula for bias and motive for testifying favorably to the State. Upon cross-examination by the defense, Paula testified that she entered pleas of guilty to the murders of her parents and agreed to testify against appellant, in exchange for the dismissal of the capital murder charges against her. The defense then inquired:

"Isn't it true that you presently have held up hundreds of dollars of forged checks or hot checks with the District Attorney's office in Jefferson County, Beaumont, being held up and no charges filed on the insistence or influence of these two gentlemen right here of the District Attorney's Office of Harris County, isn't that true?"

Paula denied that this was true. The defense then asked:

"You have never forged Herbie Derese's name to any instrument, is that correct"

The State's objection to this question was sustained.

Appellant now contends that under the authority of *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) and *Castro v. State*, 562 S.W.2d 252 (Tex.Cr.App.1978), he was denied the right of effective cross-examination and confrontation of this witness. We hold that no error is shown.

The record reflects that appellant failed to perfect a bill of exception concerning any charges pending against Paula in Beaumont. The defense asked Paula about the charges; she denied them. Appellant made no attempt to show that her answers were false. He did not perfect a bill of exception in order to let the record reflect that there were, indeed, other charges pending against Paula. Absent such a showing, no error is shown. *Toler v. State*, 546 S.W.2d 290 (Tex.Cr.App.1977); *Garza v. State*, 532 S.W.2d 624 (Tex.Cr.App.1976).

In *Simmons v. State*, 548 S.W.2d 386 (Tex.Cr.App.1977), upon which appellant relies, the defendant was not permitted to develop a bill of exception concerning a witness' prior charges in his attempt to show bias towards the State. This case is inapplicable to the instant case, since here, appellant made no attempt to perfect such a bill. Further, in *Davis v. Alaska*, supra, and *Castro v. State*, supra, both defendants preserved error by letting the record reflect the matters which were excluded by the trial courts. Thus, they do not control the disposition of this ground of error. Appellant's contention is overruled.

[35] In his sixteenth ground of error, appellant contends that the trial court erred in failing to instruct the jury that the State's witness Ben Tabor was an accomplice witness as a matter of law. Appellant has failed to preserve error on this ground. In his oral objections to the charge, appellant failed to raise this ground before the trial court. Further, his requested Charge No. 1, upon which he relies, did not deal with the issue of whether Tabor was an accomplice witness as a matter of law. Rather, the requested charge dealt with the rule regarding corroboration of accomplice witness testimony.[1] See Article 38.14, Vernon's Ann.C.C.P. Since appellant's ground of error on appeal differs from his objections raised in the trial court, nothing is preserved for review. *Sloan v. State*, 515 S.W.2d 913 (Tex.Cr.App.1974); *Campbell v. State*, 492 S.W.2d 956 (Tex.Cr.App.1973).

1. "Defendant's Requested Charge No. 1: Now if you believe from the evidence beyond a reasonable doubt that an offense was committed as charged, and you further believe from the evidence, or have a reasonable doubt thereof, that the witness BEN MILTON TABOR is an accomplice; you are instructed that you cannot convict the Defendant upon the testimony of the said BEN MILTON TABOR, unless you first believe that the testimony of the said BEN MILTON TABOR, is true and it shows that the Defendant is guilty as charged in the indictment, and unless you further find and believe that there is other evidence in the case outside of the said testimony of the said BEN MILTON TABOR, tending to connect the Defendant with the commission of the offense charged against him, and from all of the evidence you must believe beyond a reasonable doubt that the Defendant is guilty as charged in the indictment."

We note that the trial court did submit a charge to the jury as to whether Tabor was an accomplice witness, and charged the jury on the accomplice witness corroboration rule. See Article 38.14, supra. We direct appellant's attention to *Lafoon v. State*, 543 S.W.2d 617 (Tex.Cr.App.1976); *Jackson v. State*, 516 S.W.2d 167 (Tex.Cr.App.1974) and *Mutscher v. State*, 514 S.W.2d 905 (Tex. Cr.App.1974). This ground of error is overruled.

In his seventeenth and eighteenth grounds of error, appellant contends that the trial court erred in overruling his objections to testimony offered at the punishment phase of the trial. The record reflects that at the punishment phase, Joyce Sinclair, a former girlfriend of appellant's, testified that in February of 1976, appellant had attempted to extort money from her and had threatened her. She also testified that appellant told her of his intent and plans to murder Don Sinclair, her husband. Don Sinclair testified that he had an encounter with appellant, whom he recognized even though appellant was disguised. Appellant later told Joyce that he had intended to kill Don during this encounter, but that he was prevented from doing so by the proximity of a police officer.

Appellant objected to the admissibility of this testimony. A hearing was held out of the presence of the jury, after which the trial court overruled appellant's objections.

At the punishment phase of a capital murder trial, one of the issues which the jury must determine is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Article 37.071(b)(2), Vernon's Ann.C.C.P. Further, this statute provides that at the punishment phase of a capital murder trial, "evidence may be presented as to any matter that the court deems relevant to sentence." (Emphasis added)

In *Jurek v. State*, 522 S.W.2d 934 (Tex.Cr. App.1975), we stated that the range and severity of a capital defendant's prior criminal conduct was relevant evidence for a jury to consider in determining the likelihood that the defendant would be a continuing threat to society. In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Supreme Court of the United States emphasized that "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."

In *Garcia v. State*, 581 S.W.2d 168 (Tex. Cr.App.1979), and *Hammett v. State*, 578 S.W.2d 699 (Tex.Cr.App.1979), we held that nothing in Article 37.071, supra, requires that there be a final conviction for an extraneous offense to be admissible at this stage of a capital trial. We stated in *Garcia*:

> "Clearly, evidence of prior offenses falls within the range of 'prior criminal conduct.' Such 'prior criminal conduct' is clearly relevant to the jury's deliberations on special issue number two . . ."

See also *Hammett v. State*, supra.

[36, 37] Since the trial court has wide discretion in admitting evidence at the punishment phase of a capital murder trial, see *Gholson and Ross v. State*, 542 S.W.2d 395 (Tex.Cr.App.1976); *Livingston v. State*, 542 S.W.2d 655 (Tex.Cr.App.1976); *Moore v. State*, 542 S.W.2d 664 (Tex.Cr.App.1976); *Robinson v. State*, 548 S.W.2d 63 (Tex.Cr. App.1977); *Brown v. State*, 554 S.W.2d 677 (Tex.Cr.App.1977), we hold that this relevant evidence of appellant's prior criminal conduct was admissible for the jury's consideration. *Garcia v. State*, supra; *Hammett v. State*, supra; see also, *Brooks v. State* (60,521, delivered March 21, 1979); *Earvin v. State*, 582 S.W.2d 794 (Tex.Cr. App.1979).

These two grounds of error are overruled.

[38] In his final ground of error, appellant contends that the trial court erred in overruling his objection to Joyce Sinclair's testimony concerning a telephone conversation with an unidentified caller. Joyce testified that on January 6, 1976, appellant told her of his thwarted plans to kill her husband, Don. He also advised her that he had a "hit man" coming from Dallas, and then threatened her. About an hour and a

half after this telephone conversation with appellant, Joyce received another call. She did not recognize the voice, nor did the caller identify himself. Over appellant's objection, Joyce testified that the caller stated that he did not appreciate the way she was treating appellant, and said that if anything happened to appellant, he would return from Dallas and kill Joyce and her family. The caller then hung up. Shortly thereafter, appellant called Joyce and apologized for harassing her and her husband.

Appellant now contends that the court erred in allowing Joyce to testify about the conversation with the unidentified caller. Error, if there was any, in the admission of this testimony was clearly harmless in light of the substantial testimony concerning appellant's repeated threats, expressed intent to do harm to, and criminal acts toward, Joyce and Don Sinclair. See *Johnson v. State*, 548 S.W.2d 700 (Tex.Cr.App.1977); *Myre v. State*, 545 S.W.2d 820 (Tex.Cr.App. 1977); *Dalton v. State*, 516 S.W.2d 937 (Tex.Cr.App.1974). This ground of error is overruled. Appellant's pro se ground of error has already been overruled.

The judgment is affirmed.

## APPENDIX A

In the course of examining Benny Ballard, the trial court inquired:

"Q. In the past I am sure you have probably heard, read or seen something about this case.

"A. [Ballard] No, not this one.

"Q. You do not recognize this case?

"A. I wouldn't know a soul in here or anything about it?

"Q. All right. I believe that the evidence will show the additional fact that the offense, if any, happened in Baytown, Texas. And, again, I will repeat the names involved in the indictment—Vernon Eugene McManus, Paula Cantrell Derese, Paul Harvey Cantrell and Mary Bright Cantrell.

"A. Now that you mention Baytown, there was a write-up in the newspaper. It was all over the newspaper. Couldn't help but read it about this girl who was supposed to have hired somebody to murder her parents for the insurance money . . . I don't know if this is the case. I am bad on names. But I do remember that about Baytown.

"Q. . . . did you read about it, did you follow it with avid interest or just follow it with passing interest?

"A. No, I just read about it in the paper. I would go to work, and somebody would say: Did you hear about so and so.

* * * * * *

"Q. So, you have read something about it and you have discussed it on occasion with fellow employees or family or friends. Is that a fair statement?

"A. That would be fair.

"Q. What is the last thing you recall reading about the case?

"A. Just that they had the girl up on charges of hiring two people. That is all I remember.

"Q. Do you have any recollection or any knowledge of the present status of the Derese case.

"A. No, I don't know what has happened to the girl.

"Q. You have not read, seen or heard anything about that, then?

"A. No.

"Q. As a result of what you have read, seen or heard in the news media, or the result of any conversations you may have had in regard to the case with your fellow employees or anyone, have you formed any conclusion as to the guilt or innocence of this defendant, Vernon Eugene McManus?

"A. No, I haven't any conclusions at all.

"Q. None whatsoever. In the event that you are selected as a juror in this case, and if, during the conduct of the trial, something comes up

APPENDIX A—Continued

that my [sic] trigger your memory as to something you have read, seen or heard, I think you will admit that is a possibility?

"A. It is a possibility. I know when you said Baytown awhile ago, it clicked in my mind.—

"Q. If such a thing should happen—if something you hear at the trial of the case triggers something in your mind about anything you have read, seen or heard discussed, could you and would you set that out of your mind and let your verdict rest entirely upon the sworn testimony of witnesses in the courtroom and any physical evidence that may be admitted?

"A. That's right. I would disregard everything because I know how wrong the papers are sometimes."

The defense examined Ballard, and asked whether he had any bias or prejudice towards appellant, to which Ballard responded "I don't even know the man." Ballard also denied that there was any reason why he could not be a fair and impartial juror.

APPENDIX B

During the examination of juror Achgill, the court inquired:

"[THE COURT] Now, have you seen, read, heard or discussed anything about this case, or do you recognize the case from the names?

"A. [Achgill] From what you described in the indictment, I recognize I heard it on TV.

"Q. All right. The facts will show in this case that it also occurred in Baytown, if that is any help. But you say you have recognized some of the names and seen or heard it on TV?

"A. The part that I recognize is the insurance part of it.

"Q. That it was done for the proceeds—

"A. Yes, right.

"Q. What is the last thing you recall having seen, read or heard about the case?

"A. Well, I was sitting at home last night talking to my son, the TV was on, and it was on Channel 2, and they started saying that this case—that they were trying to pick a jury for this case and two jurors had been chosen. At that point I turned the TV off.

"Q. Thank you, sir. You are a juror that actually followed the Court's instructions. I appreciate it, and I know counsel does. All right. Then, before that, what is the last thing you recall having read, seen or heard?

"A. I couldn't even recall when I heard about it.

"Q. Does the name Paula Cantrell Derese ring a bell?

"A. No, sir.

"Q. Then I assume you don't have any idea what has happened in her case?

"A. No, sir.

"Q. Do you recall ever seeing, reading or hearing anything about this case at its inception?

"A. No, sir.

"Q. Around the middle of last year?

"A. No, sir.

"Q. All right. Well, based on what you have seen, read or heard or discussed with other people, have you formed any conclusion, however slight, as to the guilt or innocence of this defendant, Vernon Eugene McManus?

"A. No, sir. The whole thing is just a vague recollection to me. I have not formed any opinion.

"Q. Then, you have not formed any conclusion whatsoever, as to his guilt or innocence at this moment?

"A. No, sir.

"Q. Nor have you in the past?

"A. No, sir.

"Q. All right. Would you answer this, then: In the event that you were on this jury and during the course of

APPENDIX B—Continued

the trial something came up which might trigger your memory of something you have read, seen or heard, could you and would you set that aside, realizing it is the rankest hearsay, and base your verdict entirely upon the evidence and the testimony that you hear in this courtroom?

"A. Yes, sir."

PHILLIPS, Judge, dissenting.

This is an appeal from a conviction for the offense of capital murder. V.T.C.A. Penal Code, Section 19.03(a)(3). Punishment was assessed at death pursuant to Article 37.071, V.A.C.C.P.

Appellant's first ground of error complains of the trial court's failure to grant his motion to quash the indictment since it failed to adequately apprise the appellant of the capacity in which the State intended to prove he participated in the alleged murder for remuneration. The indictment, in relevant part, reads as follows:

. . . VERNON EUGENE MC MANUS . . . , heretofore on or about July 24, 1976, did then and there unlawfully intentionally and knowingly, acting as a party with Paula Cantrell Derese and other persons to the Grand Jury unknown, cause the death of Paul Harvey Cantrell by choking and strangling him with a cord and cutting him with a knife; and said murder was committed for remuneration and the promise of remuneration, namely, money from the proceeds of life insurance and the estate of Paul Harvey Cantrell and Mary Bright Cantrell. . . .

Appellant filed a motion to dismiss the indictment which alleged that the indictment was inadequate in terms of fairly apprising the appellant of the offenses he was charged with and that, in violation of the United States Constitution, the allegations were vague, indefinite, contradictory, and uncertain in advising him of the nature and cause of the accusation. A hearing was held on the motion to dismiss the indictment wherein the appellant argued that the lack of specificity in the indictment with respect to the various roles played by the various enumerated parties in the commission of the alleged capital murder hindered any preparation of a defense. It was pointed out to the trial court that the indictment failed to identify who among the enumerated parties was the promisor or promisee of the remuneration promised. V.T.C.A. Penal Code, Section 19.03(a)(3) provides that capital murder is committed when an individual is intentionally and knowingly killed by a person "for remuneration or the promise of remuneration." The indictment, as drafted, alleges only that the appellant, while acting as a party with Paula Cantrell Derese and other persons unknown, caused the death of Paul Harvey Cantrell. It is then alleged that that murder was committed for remuneration and the promise of remuneration.

This Court held in the En Banc decision of *Drumm v. State*, 560 S.W.2d 944 (Tex.Cr. App.), that the analysis to be engaged in on appeal when reviewing an allegation concerning the failure of the trial court to grant a motion to quash differs from the analysis engaged in in determining whether the pleadings were sufficient to invoke the jurisdiction of the trial court. In the latter situation, an indictment which tracks the statutory terms proscribing the conduct involved is sufficient to invoke the jurisdiction of the court. *American Plant Food Corp. v. State*, 508 S.W.2d 598 (Tex.Cr. App.). On the other hand, when a motion to quash is the subject of analysis, "fundamental constitutional protections are invoked. Because of the fundamental notions of fairness that require adequate notice of the nature of the charges against the accused in our system of justice, a timely claim of inadequate notice requires careful consideration." *Drumm*, supra, at 946.

As further stated in *Drumm*, supra, at 947:

. . . It is not for us to speculate on possible defenses; those are for the accused and counsel to investigate, prepare, and establish if they can. In order to perform that duty, however, the accused is entitled to notice of the particu-

lar cause for suspension upon which the state will rely. The accused is not required to anticipate any and all variant facts the state might hypothetically seek to establish. When the defendant petitions for sufficient notice of the state's charge by motion to quash adequately setting out the manner in which notice is deficient, the presumption of innocence coupled with his right to notice requires that he be given such notice. Appellant here was entitled to such notice and his motion to quash was sufficient to point out his need. The motion to quash should have been granted.

One's presumption of innocence and right to notice are no less when the prosecution is for capital murder, punishable by death. In fact, even more care is required in a capital case. *Chambers v. State*, 568 S.W.2d 313 (Tex.Cr.App.1978) (Roberts, J., dissenting); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

It should be clear to all that appellant, even upon timely request, was denied the right to know prior to trial *from whom* the State contends he received remuneration or a promise of remuneration. The constitutional right to know the nature and cause of the accusation against him requires that he be informed of such fact as surely as it requires that he be informed of the name of the human being he is alleged to have killed. One is as essential as the other. The indictment should have been quashed.

In his second ground of error appellant contends that the court erred in failing to grant his motion for change of venue, which was uncontroverted by the State prior to jury selection. Recently in *Henley v. State*, 576 S.W.2d 66 (Tex.Cr.App.1978), this Court wrote:

> Appellant was entitled to a change of venue if he could show, even though it would be possible to select a jury whose members were not subject to a challenge for cause, that there were influences in the community which could affect the answers on voir dire, or the testimony of witnesses at trial or that for any other reason a fair and impartial trial could not be had in Bexar County.

As will be noted upon reference to Articles 31.03 and 31.04, the trial court is vested with the responsibility of determining the "truth and sufficiency" of the affidavits alleging the grounds for a change of venue and when an issue is formed as to those grounds by the filing of controverting affidavits, that issue "shall be tried by the judge, and the motion granted or refused, as the law and facts shall warrant." As already demonstrated, the issues raised by the motion to change venue affidavits cannot be fully and adequately tried through the more narrow jury voir dire procedure. See Article 35.16, Sections 8 and 9, V.A.C.C.P. Further, the trial court's denial of a defendant's motion for a change of venue, without allowing the defendant an opportunity to present evidence in support of his motion, was expressly condemned by this Court in *Burleson v. State*, 131 Tex. Cr.R. 576, 100 S.W.2d 1019. The dissent admits that the trial court failed to comport with "accepted procedure," but seeks to excuse the omission by analogy. The analogy to the trial court's discretion in regulating trial procedure vis-a-vis evidentiary rulings and the perfecting of a bill of error with respect thereto ignores a fundamental distinction between the questions involved. The dissent's analogy presupposes the propriety of conducting the trial. The procedure demanded of the trial court under Chapter 31, V.A.C. C.P., is for the threshold issue of whether a trial should be conducted in the county involved. The timing of the Chapter 31 hearing is critical. It is no less mandatory a statute for its failure to expressly designate the precise timing for a hearing. To argue that the inquiry mandated by Chapter 31 could be just as efficaciously conducted in a hearing on a motion for new trial is to ignore the venue issue's threshold nature. It is indeed putting the horse behind the cart. . . .

*Id.* at 72.

In the instant case, the motion to change venue was uncontroverted before the jury voir dire commenced and the trial court was

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well aware of the motion. The same policy consideration underlying the *Henley* opinion, i. e., the delayed timing of the factual inquiry, applies here as well. Only after the jury was impaneled and sworn was any factual inquiry on the motion to change venue conducted.[1] The voir dire in this trial lasted 30 days and consumes 5,337 pages of this record. Considerable energy and resources were already committed to the trial of this case before the critical threshold issue was ever heard.

This Court has examined on several occasions when a defendant is required to present his motion for change of venue.

In *Devereaux v. State*, 473 S.W.2d 525 (Tex.Cr.App.), the defendant filed his motion for change of venue prior to voir dire. The motion was never urged to the trial court and the defendant's counsel indicated to the court the matter would not be pursued. Subsequently, the defendant announced ready for trial and began voir dire examination of the jury panel. At the conclusion of voir dire, the defendant's motion for change of venue was mentioned to the court. The trial court then denied the motion as being untimely presented. This Court upheld the trial court's decision quoting Article 28.01, V.A.C.C.P.[2]

In *Mirick v. State*, 83 Tex.Cr.R. 388, 204 S.W. 222, the defendant made a motion for change of venue after nine jurors had been selected and sworn. The State controverted the motion and demurred on the grounds that the motion was presented too late. The trial court overruled the defendant's motion and this Court upheld such ruling.

These cases stand for the proposition that a motion for change of venue must be presented before trial, i. e., prior to jury selection. This determination is consonant with the very reasons for a change of venue. If there exists such an air of popular sentiment against an accused as to prevent a fair and impartial trial, a change of venue is necessary. That this matter must be placed in issue prior to voir dire stems from the very nature of community sentiment. If there exists in a community a pervasive prejudice against a defendant, an individual venireman may not be aware of such feeling on his part. As was noted in *Faulkner v. State*, 43 Tex.Cr.R. 311, 65 S.W. 1093: "Prejudice is a sinister quality. It may possess a man and he not be aware of it; . . ." This statement points up the problem of determining prejudice on voir dire. News coverage may be so widespread and extensive that the answers elicited by counsel on voir dire may not reflect the subconscious prejudice prevalent in the community resulting from such coverage. Because of the insidious nature of prejudicial community sentiment and the ineffectiveness of voir dire as a means for determining this sentiment, it is essential that the component issues of Article 31.03, supra, be joined and, to the extent possible, resolved prior to voir dire.

In the instant case the appellant was never allowed to present any evidence on his motion *prior to* the voir dire of the jury panel, and the trial court "carried along" an uncontroverted motion to change venue which presented no evidentiary issues for the court to rule on.

The hearing of evidence on a motion for change of venue is a factual trial of the constitutionally critical issue of whether the defendant is to be tried in an atmosphere undisturbed by public passion. *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). In a concurring opinion Mr. Justice Frankfurter summed it up as follows:

1. Jeopardy attaches when the jury is impaneled and sworn. *Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978).

2. Article 28.01, V.A.C.C.P., Section 1, provides, in part:

Section 1. . . . The pre-trial hearing shall be to determine any of the following matters: . . .

(7) Motions for change of venue by the State or the defendant; provided, however, that such motions for change of venue, if overruled at the pre-trial hearing, may be renewed by the State or the defendant during the voir dire examination of the jury; . . ."

. . . This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade. *Id.*, 366 U.S. at 730, 81 S.Ct. at 1647.

In deciding this vital issue great discretion is reposed in a trial judge. *Ward v. State*, 427 S.W.2d 876 (Tex.Cr.App.); *James v. State*, 546 S.W.2d 306 (Tex.Cr.App.). His finding of fact thereon is not reviewable by a jury; and if there exists any conflict in the evidence on said issue, his decision has generally been held to be binding upon this Court. *Chappell v. State*, 519 S.W.2d 453 (Tex.Cr.App.). Such a delicate and generally irreversible decision should be made by the trial judge without having the balance weighted against the defendant by the actual swearing in of a jury to try the defendant, with its attendant attachment of jeopardy, before permitting the defendant to offer any evidence on said issue and before the judge's decision thereon. Our statutes and unbroken line of decisions give the defendant this right. An arbitrary denial of such right, notwithstanding the defendant's demand therefor, is a denial to him of the benefits of the law of the land, and thus, due process of law. Such a denial involves such a possibility of prejudice to the defendant's right to a factual determination of such critical issue, *apart from any other consideration*, that such arbitrary procedure is inherently lacking in due process without a showing of identifiable prejudice. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

We should hold that an arbitrary denial of a defendant's asserted right under the law of this State to present evidence in support of said issue and secure a decision by the trial judge on a motion for change of venue prior to the trial judge's swearing in of a jury to try the defendant is prejudicial error. The majority's holding that a trial judge may hereafter arbitrarily refuse a defendant his statutory and constitutional right to be heard on a motion for change of venue until after he has, for all practical purposes, foreclosed the issue by swearing in a jury to try the case is a denial to a defendant of the fundamentals of due process of law.

The decision on the motion to change venue must be made prior to voir dire, keeping in mind that the motion can be *reurged* during voir dire. Article 28.01, V.A.C.C.P. This threshold issue must be decided before jeopardy attaches.

Appellant also complains that at the punishment phase the State was permitted to introduce testimony over objection that appellant committed five other extraneous offenses for which he was never tried or convicted.

Article 37.07, V.A.C.C.P., specifically provides as follows:

> Article 37.07 Verdict Must be General; Separate Hearing on Proper Punishment
>
> Sec. 3. Evidence of a prior criminal record *in all criminal cases* after a finding of guilty.
>
> (a) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to the prior criminal record of the defendant, his general reputation and his character. The term prior criminal record means a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged. [Emphasis added]

The admission of this testimony about five extraneous offenses that had not resulted in final convictions violated the clear prohibition of Article 37.07(3)(a). This statute expressly applies "in all criminal cases." It makes no exception for capital murder cases. Other provisions of the Code of Criminal Procedure plainly show that when the Legislature wants a different rule to apply to capital cases, it expressly creates

an exception. See, for example, Article 1.07, Article 1.14, Article 1.141, Article 35.17, Article 42.04, Article 42.12(15), Article 44.08, Article 44.09, and Article 44.35. Since the Legislature made no exception for capital cases in Article 37.07(3)(a), the inescapable conclusion is that this provision applies to capital as well as noncapital cases.

Article 37.07(3)(a) reflects a Legislative determination that evidence of prior criminal conduct not resulting in a final conviction is insufficiently reliable to be considered in sentencing. Unadjudicated extraneous offenses are no less relevant to sentencing in noncapital cases than they are to sentencing in capital cases. It is inconceivable that the Legislature would deem such evidence too unreliable to be considered in a noncapital sentencing decision, but at the same time allow such evidence to be considered in a sentencing decision where a person's life is at stake.

Arguably, an unadjudicated extraneous offense that is proven beyond a reasonable doubt is sufficiently reliable to be considered in any sentencing decision. Although we may disagree with the Legislature's determination that such evidence is inadmissible, it is not the role of the Judiciary to pass judgment on the wisdom of the Legislature's actions. It is certainly within the power of the Legislature to exclude evidence of prior criminal conduct not resulting in a final conviction from consideration in the sentencing decision *in all criminal cases*. Article 37.07 makes it clear that the Legislature has chosen to do so.

This Court has held in *Hammett v. State*, 578 S.W.2d 699 (Tex.Cr.App.1979), and *Garcia v. State*, 581 S.W.2d 168 (Tex.Cr.App. 1979), that Article 37.071 creates an exception to the seemingly total prohibition of Article 37.07(3)(a); therefore, Article 37.071 permits the admission of unadjudicated extraneous offenses at the punishment phase of a capital murder trial. In both cases I concurred in the judgment upholding the death sentence, but upon further consideration I am convinced that the Court's holding in both cases was clearly wrong.

There are three reasons, besides the express language in Article 37.07(3)(a) that it applies "in all criminal cases," why Article 37.071 fails to evidence a Legislative intent to create an exception to Article 37.07(3)(a). First, the only purpose of the Article 37.071 provision that "evidence may be presented as to any matter that the court deems relevant to sentence" was to prevent the anticipated constitutional infirmity of denying a defendant's right to present mitigating circumstances at the capital sentencing hearing. See *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). To infer from this provision a Legislative intent to create an exception to Article 37.07(3)(a) is to impute an intent to the Legislature that was clearly nonexistent.

Second, Article 37.07(3)(a) is a *specific* statute dealing with the admissibility of a defendant's prior criminal record at a sentencing hearing "in all criminal cases." Article 37.071, on the other hand, is a *general* statute with respect to the admissibility of this type of evidence. It is well established that when two statutes appear to conflict, the specific statute controls over the general one.

Third, Article 37.071 deals with the scope of *relevance* at the punishment phase of a capital murder trial. No one would question that unadjudicated extraneous offenses are relevant to the issue of punishment in all criminal cases. This Court held in *Porter v. State*, 578 S.W.2d 742 (Tex.Cr.App. 1979), however, that relevant evidence must be excluded at the punishment phase of a capital murder trial when its admission violates a rule of evidence.

> It is true that the trial court at the punishment phase of a capital murder trial has wide discretion in admitting or excluding evidence. . . . However, this discretion extends only to the question of the relevance of the facts sought to be proved. Article 37.071(a), supra, does not alter the rules of evidence insofar as the manner of proof is concerned.

*Porter v. State*, 578 S.W.2d at 748. The hearsay evidence admitted in *Porter* was highly relevant, but this Court reversed the

conviction because the admission of this hearsay violated a rule of evidence. Analogously, in the present case these five unadjudicated extraneous offenses, if they occurred as testified to, were relevant to the sentencing decision. But Article 37.07(3)(a) constitutes a legislatively-created rule of evidence barring evidence of unadjudicated extraneous offenses at the sentencing hearing *in all criminal cases*. When Article 37.07(3)(a) and *Porter* are read together, it should be clear that the testimony about five extraneous offenses was inadmissible. This testimony, though relevant under Article 37.071, violated a rule of evidence, namely Article 37.07(3)(a); therefore, under the rule this Court announced in *Porter*, this testimony was inadmissible.

In both *Hammett* and *Garcia* the arguments for allowing evidence of unadjudicated extraneous offenses seem superficially persuasive. Upon closer examination, however, this apparent persuasiveness evaporates.

I note at the outset that neither *Hammett* nor *Garcia* addressed the express language of Article 37.07(3)(a) that it applies "in all criminal cases." Understandably so, because any response would reveal this Court's blatant disregard for the Legislature's authority.

Both *Hammett* and *Garcia* emphasize the Supreme Court's statement in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), that "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Both cases intimate that there is a constitutional infirmity in excluding any relevant information at a capital sentencing hearing. This statement in *Jurek*, however, did not deter this Court from holding in *Porter* that relevant evidence must be excluded when its admission violates a rule of evidence. Our holding in *Porter* was consistent with another concern of the Supreme Court in capital cases, namely that the sentencing decision be based on reliable information. See *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

There is no constitutional infirmity in the Legislature's decision to apply Article 37.07(3)(a) to capital murder cases. Consonant with the Supreme Court's decisions, the Texas Legislature has the prerogative to enact a law excluding from consideration in capital sentencing decisions relevant evidence that it deems unreliable. In enacting Article 37.07(3)(a), the Legislature exercised this prerogative.

Both *Hammett* and *Garcia* state that "[n]othing in Article 37.071 . . . requires that there be a final conviction for an extraneous offense to be admissible at the punishment phase." This is true, but it conveniently ignores that there is such a requirement in Article 37.07(3)(a). Furthermore, there is nothing in Article 37.071 requiring that evidence at the punishment phase not be hearsay; nevertheless, we held in *Porter* that hearsay is inadmissible.

Finally, *Hammett* and *Garcia* rely on statements this Court made in *Jurek v. State*, 522 S.W.2d 934 (Tex.Cr.App.1975), in the course of discussing Article 37.071.

> In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct.

In light of the long-established rule that unadjudicated extraneous offenses are inadmissible at sentencing hearings, the most reasonable interpretation of this language is that "the range and severity of his prior criminal conduct" merely refers to criminal conduct resulting in a final conviction. If this Court in *Jurek* intended to overrule Article 37.07(3)(a) insofar as it applies to capital murder cases, it would have used express language to do so. It is unreasonable to infer from such cursory treatment that this Court intended to do something as drastic as overruling an act of the Legislature.

In *Rumbaugh v. State*, 589 S.W.2d 414 (Tex.Cr.App.1979), the Court indulges in some ill-considered dicta concerning the re-

lationship between Article 37.07(3)(a) and Article 37.071. The Court concludes that the Legislature intended to allow admission of unadjudicated extraneous offenses at the punishment phase of a capital murder trial. The basic fallacy in the Court's reasoning is its assumption that Article 37.07(3)(a) applies only to noncapital cases. This ignores the express language of Article 37.07(3)(a) that it applies "in all criminal cases."

The Court in *Rumbaugh* wrote as follows:

> Had [the Legislature] wanted to limit the proof in capital trials to adjudicated offenses, it could have provided so in Article 37.071, as it has in Article 37.07. There being nothing in Article 37.071 to require such a limitation, this Court cannot impose it.

Since the Legislature made Article 37.07(3)(a) applicable "in all criminal cases," it is unreasonable to expect the Legislature gratuitously to restate this rule of evidence in Article 37.071. What *Rumbaugh* should have said was: There being nothing in Article 37.071 to create an exception to Article 37.07(3)(a), this Court cannot impose it.

The thrust of *Rumbaugh's* argument is that the Legislature's choice of a bifurcated procedure in capital cases evidences its intent to permit proof of unadjudicated extraneous offenses at the punishment phase. There is nothing to support this argument. The Legislature chose a bifurcated procedure in capital cases just as it chose such a procedure in noncapital cases. No one seriously would contend that the Legislature's choice of a bifurcated procedure in noncapital cases demonstrates its intent to permit proof of unadjudicated extraneous offenses at the punishment phase of a noncapital trial. All acknowledge that in such a situation Article 37.07(3)(a) manifests the Legislature's intent to limit proof of extraneous offenses to those resulting in a final conviction.

There is no basis for inferring a different intent in capital cases. The choice of a bifurcated procedure in capital cases, together with Article 37.07(3)(a), evidences a Legislative intent to limit proof of extraneous offenses at capital sentencing hearings to those resulting in a final conviction.

I would construe Article 37.07(3)(a) to apply in scope exactly as the Legislature specifically stated it to apply, *in all criminal cases*. To the extent that the following cases permit evidence at a capital sentencing hearing of prior criminal conduct not resulting in a final conviction, they should be overruled: *Hammett v. State*, 578 S.W.2d 699 (Tex.Cr.App.1979); *Garcia v. State*, 581 S.W.2d 168 (Tex.Cr.App.1979); *Wilder v. State*, 583 S.W.2d 349 (Tex.Cr.App.1979); *Rumbaugh v. State*, 589 S.W.2d 414 (Tex.Cr.App.1979); *Green v. State*, 587 S.W.2d 167 (Tex.Cr.App.1979).

For the above reasons, the judgment and sentence should be reversed.

CLINTON, Judge, dissenting.

Elsewhere I have expressed the view that an indictment is sufficient to withstand an exception to form contemplated by Article 27.09, V.A.C.C.P.—that is, as required by Article 21.02, *id., inter alia*, the offense is alleged "in plain and intelligible words"—*if* it includes the requisite "element of offense" requirements of V.T.C.A. Penal Code, § 1.07(a) and tracks the broad statutory statement of the offense, incorporating a description of the prescribed method or manner by which the underlying facts suggest the offense was committed.[1] Accordingly, had the indictment in this case been drawn in terms of the statutorily stated element that enhances a killing to the capital offense of murder for hire or hire to murder, I would not be writing at all in this case—nor even participating—for it was submitted in 1978.[2] But, the drafter of the

1. See generally *Monix v. State*, 579 S.W.2d 466 (Tex.Cr.App.1979) (Dissenting opinion on State's motion for rehearing). (All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.)

2. Generally I have been reluctant to participate in En Banc decisions in causes presented to the Court before I became a member. Here, however, the issue on which I write is purely one of construction of the written indictment, and that I did not hear oral argument on it is really of

indictment did not follow the critical statutory language and, in failing to do so, in my judgment, the plain and intelligible words of the statute were converted into an ambiguous and uncertain phrase that constitutes the very heart of the allegation.

Concisely, the scrivener converted the transitive verb "commits" in the statutory phrase "commits the murder" to an intransitive verb "committed" in the indictment phrase "murder was committed."

Elaborating on the proposition, a standard meaning of the transitive verb commit is "to do or perpetrate, as an offense or crime." Thus the statute denounces the person who intentionally or knowingly causes the death of another *and* "commits the murder" for hire. Here, then, had the indictment clearly alleged that appellant did ". . . cause the death of Paul Harvey Cantrell by choking and strangling him with a cord and cutting him with a knife; and committed the murder for remuneration and the promise of remuneration . . ." it would have truly tracked the statute and clearly been sufficient.[3] However, what was actually alleged is that appellant ". . . did then and there . . . cause the death of Paul Harvey Cantrell by choking and strangling him with a cord and cutting him with a knife; and *said murder was committed* for remuneration . . ." This departure from the statutory track immediately introduces some degree of vagueness, but when coupled with common usage of the word "cause" as in "cause the death" of the victim—to "bring about; effect" not necessarily by one's own hand—the indictment no longer clearly alleges that appellant, himself, committed murder and committed it for remuneration or the promise of remuneration. Rather, it may easily be read to mean that in some culpable manner other than by his own hand appellant brought about the death of the victim by hiring the murderer.

Inserting the "party" allegation further compounds the otherwise already indefinite language set forth. Thus it is said that appellant was "acting as a party with Paula Cantrell Derese and other persons to the Grand Jury unknown" in causing the death of the victim. Unless we are permitted to assume—and assuredly in a capital murder case we should not lightly so assume—the indictment may now be read as reporting that some unknown person, by choking and strangling the victim and cutting him with a knife, thereby caused death, and did so for remuneration and the promise of remuneration. In this light, appellant is charged with directly hiring, or being a party to hiring, for murder rather than murdering for hire.

Furthermore, by using "committed" as an intransitive verb in the past tense the draftsman fails to identify recipient of the remuneration or the promisee of it.

One can find other faults, but enough has been seen and explicated by me to conclude that the alleged offense is not set forth in plain and intelligible words. Therefore, I believe that the judgment should be reversed and the cause remanded for a new trial.[4] Accordingly, I respectfully dissent.

ROBERTS, J., joins.

little moment. My part in this cause, though, is limited to this ground of error.

3. See 7 Texas Practice 34, Morrison & Blackwell, Criminal Forms § 4.06, McClung, Jury Charges for Texas Criminal Practice 293 294. Compare 2 Texas Annotated Penal Statutes With Forms (Branch's 3rd Edition) 17, para. (c).

4. Being a matter of form, pursuant to Article 28.10, V.A.C.C.P., the indictment may be amended at any time before announcement for the new trial that should be ordered.

Cause No. 249,771

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|---|---|---|
| EX PARTE, | I | IN THE DISTRICT COURT OF |
| | I | HARRIS COUNTY, T E X A S |
| VERNON EUGENE McMANUS | I | 179TH JUDICIAL DISTRICT |

PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE JUDGE OF SAID COURT:

Petitioner, VERNON EUGENE McMANUS, moves that he be permitted to file the attached petition for a writ of habeas corpus in forma pauperis and to proceed in forma pauperis. In support of this motion, the Petitioner states under oath the following facts:

I.

I, VERNON EUGENE McMANUS, am presently incarcerated in the Texas Department of Corrections where I am held on a conviction for the offense of capital murder.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that he be granted leave to file and to proceed in forma pauperis in the above captioned habeas corpus proceeding.

Respectfully submitted,

VERNON EUGENE McMANUS, Petitioner

STATE OF TEXAS I

COUNTY OF _____ I

BEFORE ME, the undersigned authority, on this day personally appeared VERNON EUGENE McMANUS, who stated on oath that the foregoing motion to proceed in forma pauperis is true and correct.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 28 day of January, A.D., 1980.

Jerry E. Alford

NOTARY PUBLIC IN AND FOR

Walker

COUNTY, T E X A S